83 - 1889

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD E. WILLIAMS, ... Petitioner

versus

SECRETARY OF HEALTH, EDUCATION & WELFARE, ... Respondent

On Writ of Certiorari to the Unites States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Richard E. Williams, pro se
225 Stony Creek Road
Branford, Connecticut 06405

(203) 488-7062

QUESTIONS PRESENTED FOR REVIEW

1. Has the petitioner's rights under the 5th Amendment to the United States Constitution been violated?

2. Has the petitioner's rights under the 9th Amendment to the United States Constitution been violated?

Petitioner submits that the answer to both these questions is "Yes".

LIST OF PARTIES

All parties to this case are listed where the caption of the case appears on the front cover of this petition.

TABLE OF CONTENTS

INDEX TO APPENDICES:

TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

October Term, 1983
No.

RICHARD E. WILLIAMS, ... **Petitioner**

VS.

SECRETARY OF HEALTH,
EDUCATION AND WELFARE, ... **Respondent**

PETITION FOR WRIT OF CERTIORARI

REPORT OF OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported. It is reproduced as Appendix A. The opinion of denial of petitioner's petition for rehearing and suggestion for rehearing en banc is reproduced as Appendix B. Both Appendix A and Appendix B are a part of this petition and are presented, for the Court's convenience, in a separately bound volume marked Petitioner's Appendix To Petition For A Writ of Certiorari.

STATEMENT OF JURISDICTION

On December 29, 1983 the Court of Appeals entered judgment affirming the denial of petitioner's application for disability insurance benefits. Petitioner timely petitioned for rehearing which was denied on February 27, 1984. The jurisdiction of this Court is invoked under Title 42 United States Code 405(g).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent parts of the constitutional, statutory and regulatory provisions involved in this case are reproduced in the Appendix to this Petition, in the separately bound volume marked Petitioner's Appendix To Petition For A Writ of Certiorari, as follows:

(1) Appendix V: Constitutional
(2) Appendix W: Statutory/Code of Federal Regulations
(3) Appendix X: Regulatory

STATEMENT OF FACTS

In 1977, the petitioner filed a claim for disability insurance benefits. In 1979, after two purported respondent agency hearings before so-called Administrative Law Judges, the petitioner filed suit against the respondent, Secretary of Health, Education & Welfare, through his wife and duly authorized lay representative, Lynn C. Williams, who prepared the complaint and entered same in his behalf, at the United States District Court of Connecticut at New Haven, Connecticut, docket number N-79-338. In 1981, petitioner, again, through his lay representative, caused a Motion To Restore To Active Docket to be filed in said Court after a third purported respondent agency hearing before a third so-called Administrative Law Judge, hereinafter referred to as ALJ, alleging, inter alia, inaccurate/erroneous factual findings upon the face of the third ALJ's recommended decision to resolve crucial issues (See Appendix Y(i)), administrative procedural deficiencies and constitutional due process violations -which was granted by said District Court.

In 1983, said Court erroneously applied a limited review standard and wholly failed to consider the merits of petitioner's aforestated allegations although the Court was provided with clear unequivocal truthful facts, substantiated by documentation proving petitioner's aforestated allegations. Petitioner appealed to the United States Court of Appeals for the Second Circuit, docket number 83-6139. That Court held there was substantial evidence that supported the respondent's decision.

Further, the actions of petitioner's, then, attorney was binding on petitioner, in particular, that counsel withdrew the request for the ALJ's disqualification and agreed to the use of interrogatories, rather than insisting on subpoenaing certain witnesses and that petitioner was not entitled to have a second representative since petitioner had signed an authorization to have a lawyer represent him at the hearing. Moreover, that Court reached the remarkable conclusions that: (1) petitioner's allegations of improper ex-parte actions by the ALJ were utterly without merit and (2) there was no merit to the argument that the District Court violated petitioner's due process rights-despite overwhelming evidence on the face of the

administrative record and attached to the pleadings to the District Court and to the brief filed in the Court of Appeals to the contrary. This petition was filed from the denial of rehearing by the Second Circuit.

REASONS FOR GRANTING THE WRIT

Where petitioner presented clear, unequivocal, truthful facts which irrefutably attested the blatant denial of minimum procedural due process hearing requirement rights, deprivation of constitutional rights and inaccurate/erroneous factual findings to resolve the crucial issue of petitioner's medical management upon the face of the ALJ's recommended decision, including the ALJ's failure to properly consider the crucial adversary physician's (Dr. Poverman's) interrogatory responses, under oath, in the evidentiary record, due process demanded the Appeals Court - not only consider the irrefutable evidence in petitioner's record but - consider the affidavits presented to said Court by petitioner's lay representative, former attorney and the petitioner.

The Court of Appeals' proposition that the attorney's failure to proceed on the disqualification issue and upon insisting on subpoenaing certain witnesses was binding on petitioner is untenable based on the affidavits presented to the Court and, in particular, the attorney's affidavit (See Appendix Y(2)). Further, such proposition advanced by the Second Circuit is incompatible with the proposition advanced by said Court in *Decker* v. *Harris*, 647, F.2d 291 (2nd. Cir. 1981) which held - it clear that the duty to inquire into additional impairments a claimant may suffer from is not obviated by the presence of counsel. Moreover, in the following cases benefits have been awarded or remands ordered when - the Secretary did not insure the actions of the Social Security Act were fair and thorough, even though a claimant was represented by counsel:

Kelley v. *Weinberger*, 391 F. Supp. 1337 (D.C. Inc. 1974)
Garrett v. *Richardson*, 363 F. Supp. 83 (D.C.S.C. 1973)
Tillman v. *Weinberger*, 398 F. Supp. 1124 (N.D. Ind. 1975)
Rayborn v. *Weinberger*, 398 F. Supp. 1303 (N.D. Ind. 1975)
Palik v. *Mathews*, 422 F. Supp. 547 (D. Neb. 1976).

Clearly, the attorney had no reasonable ground to challenge the integrity of the ALJ and properly refrained from doing so on the date of petitioner's second re-hearing in reliance of the ALJ's expressed representations and his position of public trust rather than rely on petitioner's lay representative's bare assertions and accusations of malfeasance committed by the ALJ. (See Appendices Y(1) and Y(2)).

Unfortunately, to the petitioner's prejudice and peril, some months after the hearing, irrefutable evidence patently demonstrated malfeasance committed by the ALJ documenting the said ALJ had acted in violation of 20 §404.1546 of the Code of Federal Regulations, Title 5 U.S.C. §554(d) (1), §554(d) (2) and §557(d) (1) (C) (i) (ii) and (iii) of the Statutes, Social Security Regulations §404.922, §404.926, §404.927, §404.980 and §404.983, Amendments V and IX of the United States Constitution in addition to ethical violations of Canons 2A, 2B and 3A(4) of the Code of Judicial Conduct. Thus, the Court of Appeals' procedure in intentionally overlooking the ALJ's acts of malfeasance in wilful disregard of the petitioner's rights and attempting to make the petitioner's former counsel the "fall guy" and scapegoat was utterly outrageous and shockingly unconscionable.

Ironically, the Second Circuit further remarkably ascribed petitioner's medical management, solely and exclusively, to his primary treating physician, Dr. DePonte, despite overwhelming record evidence petitioner during the past three years was concurrently treating with other physicians, including Drs. Seery, Nezlo and Toole, by accepting the ALJ's contrived explanation, as plausible, contained in his recommended decision that "It is not necessary for the undersigned [ALJ] to reconcile every conflicting shred of medical evidence...".Thus, the recommended decision recognized the existence of petitioner's concurrent treating physicians but fails to accord such physicians' any weight nor credibility determinations while the District Court and the Court of Appeals have wholly failed to recognize the existence of petitioner's aforestated concurrent treating physicians. Accordingly, it is axiomatic that the respondent agency, the Connecticut District Court and the Second Circuit Court of Appeals have acted in serious and extreme

conflict herein in that the crucial issue of weight/recognition of treating physicians is well established in the Second Circuit and well settled in other circuits, in that the established law is precisely - it is error for the Secretary to ignore, or to fail to consider evidence by treating physicians. *See, e.g.,*

Alvarado v. *Califano*, 605 F. 2d 34 (2nd Cir. 1979)
Aubeuf v. *Schweiker*, 649 F. 2d 107, 112 (2nd Cir. 1981)
Boyd v. *Heckler*, 704 F. 2d 1207, 1211 (11th Cir. 1983)
Denton v. *Weinberger*, 412 F. Supp. 450, 453 (S.D.N.Y. 1972)
DePaepe v. *Richardson*, 464 F. 2d 92, 99-100 (5th Cir. 1972)
Dousewicz v. *Harris*, 646 F. 2d 771, 774 (2nd Cir. 1981)
Eiden v. *Secretary of Health, Education & Welfare*,
616 F. 2d 63 (2nd Cir. 1980)
Fiorello v. *Heckler*, 725 F. 2d 175, 176 (2nd Cir. 1983)
Gold v. *Secretary of Health, Education & Welfare*,
463 F. 2d 38, 42 (1972)
McLaughlin v. *Secretary of Health, Education & Welfare*,
612 F. 2d 701, 704-705 (2nd Cir. 1980)
Parker v. *Harris*, 626 F.2d 231 (2nd Cir. 1980)
Smith v. *Weinberger*, 394 F. Supp. 1002, 1009 (D. M.D. 1975)
Stark v. *Weinberger*, 497 F. 2d 1092, 1097 (7th Cir. 1974)
Vega v. *Harris*, 636 F. 2d 900 (2nd Cir. 1981)

Interestingly, the first recused ALJ who initially summarily disqualified petitioner's wife and lay representative and dismissed his case at petitioner's first hearing, who was supposedly out of service insofar as this case goes, was able to affect the two subsequent determinations of this cause for the reason that he was the superior of the two subsequent ALJs (transcript of administrative proceedings pages 108, 109, 1587 and 1588). Moreover, the aforestated prior debarred ALJ violated Social Security Regulation 404.922a in that the taped record he recorded at a 1978 pre-hearing conference of this matter - he caused and/or allowed and permitted to be withheld from the Appeals Council and consequently the reviewing courts (see transcript of administrative proceedings page 1009). Ironically, the aforestated disqualified ALJ brazenly admitted at the 1978 pre-hearing conference that the long standing policy and procedure with regard to subpoena requests was not to grant such requests no matter what the reason (transcript of administrative proceedings

page 869). Thereafter, the instant ALJ, similarly boldly admitted at petitioner's second re-hearing that ". . . never had a doctor appear[ed] under subpoena . . .". All such aforestated actions were grossly in violation of petitioner's minimum due process hearing requirements rights to:

1. an impartial decision maker separated from those making the previous administrative determinations in his case
2. an effective opportunity to confront and cross-examine adverse witnesses
3. an effective opportunity for the petitioner to present his own arguments and evidence orally
4. an opportunity to retain counsel or have the informal assistance of a friend, desired by the petitioner

and in violation of Amendments V and IX of the United States Constitution (See Appendix V).

Thereafter, the instant ALJ contrived in his recommended decision torturous reasoning to justify his acceptance of the crucial adversary physicians' reports by stating his acceptance of their medical reports, over the strenuous objections of petitioner's, then, counsel by further stating he found such "physicians have prepared their reports in accordance with the standards expected of an examining physician . . ." and implicitly implied Dr. DePonte did not prepare his reports in accordance with the standards expected of an examining physician by further stating ". . . the evidentiary weight to be afforded Dr. DePonte's letters of January 11, 1979 and June 10, 1980, must be considered in light of the fact the latter report was specifically offered to claimant's counsel in preparation for the instant hearing".

Further, in recognition of 20 CFR 416.918, it was contrary to law for the lower courts to sanction the ALJ's reliance upon the crucial examining adversary physician's (Dr. Poverman's) opinion over petitioner's, then, counsel's strenuous objection especially when it was clear such physician was surreptiously provided with selective medical reports ex-parte, through the ALJ, indirectly, in further violation of 20 CFR §404.1546. The record evidence irrefutably discloses despite the instant ALJ's adamant denials that he, in truth

and in fact, caused and/or allowed and permitted multiple telephonic and written ex-parte communications to be transmitted to adversary physicians he, thereafter, ultimately relied on, in addition to Dr. Poverman, which physicians the petitioner's, then, counsel properly requested prior to hearing, to be in attendance at petitioner's second re-hearing. Thus, the ALJ's ex-parte actions were taken in wilful disregard for the petitioner's rights, the merits of his claim for disability benefits and notions of fair play and the administration of justice. The ALJ's nondisclosure of his ex-parte actions merely amplifies his personal interest and blatant constitutional assaults upon the petitioner's civil and human rights which constituted extreme undue hardship and harassment.

Moreover, the summary disqualification of petitioner's lay representative is in sharp conflict with the respondent agency's prior ruling on this very same issue (transcript of administrative proceedings page 248, also see Appendix E) with regard to Social Security Regulations §404.980 and §404.983 requiring notice of charges and hearing on charges - in addition to violations of Amendments V and IX of the United States Constitution (See Appendix V).

CONCLUSION

Over the years, this appeals process has continually been obstructed and thwarted by discrimination, bias, and repeated unjustifiable denials of disability insurance benefits and has escalated with counteractions and false claims, generated by the respondent's involved administrative officials, which have no bearing whatsoever on the ultimate issue of qualifying for disability benefits under the criteria of the Social Security Act and the major issue of the petitioner's qualification.

Thus, petitioner respectfully submits that resolution of this matter is of importance to the general public. There can be no credibility to administrative agency disability rulings when the facts presented and the available proofs which highlight unconscionable violations of petitioner's constitutional, statutory and regulatory rights demonstrate not only unbridled discretion by the respondent agency's involved administrative officials but also a serious and extreme lack of integrity. Accordingly, if our court system fails to

pursue action against a judge or judges or, for that matter, attorneys who represent the government who may be derelict in their obligation, responsibility and duty in scrutinizing disability cases (See Appendix Z), regardless of the might of the respondent agency's involved administrative officials, then the public can not have complete confidence and respect in its courts. Accordingly, it is not just the petitioner, who is at stake in this case, it is the citizens and people who make up the general public - who do, indeed, deserve complete confidence in this country as well as respect for this country's court system. Moreover, it is axiomatic and pathetic, in this case that Rule 11 of the Federal Rules of Civil Procedure has been completely disregarded by certain involved government counsel in an apparent conspiracy with the respondent agency and in gross violation of petitioner's due process rights.

The Second Circuit Court of Appeals ruling is simply untenable because it permits the rules of procedure to be stretched to promote, accommodate, condone and nurture administrative abuse, professional incompetence, ethical insensitivity coupled with government bar apathy while sanctioning malfeasance committed by the respondent agency's administrative officials. Moreover, such ruling is tantamount to judicial despotism and is further utterly repugnant to constitutional values.

The petitioner's proposition is that the irregularities appearing upon the face of this record constitute harmful error and ultimately prejudiced his claim to the extent the agency was prevented from issuing a valid order ie. recommended decision. Thus, all subsequent proceedings are vitiated and the agency's ruling is null and void -warranting reversal of the respondent agency's ruling and an award of benefits to petitioner.

Moreover, the fundamental principle of "significant", "special", "particular" and "considerable" weight traditionally accorded by the Second Circuit and other circuits to a claimant's/petitioner's treating physicians has been gutted, undermined and erroded. Surely, inaccurate/ erroneous findings regarding petitioner's true medical management should not form the underpinnings of judicial determination of the meritorious issues regarding petitioner's disability claim.

Undoubtedly, petitioner was outlandishly denied his full rights to appellate review while journeying through this appeals process. The utter failure of the Secretary to insure the actions of the Social Security Act were fair and thorough - even though petitioner was

represented by counsel - at the crucial administrative hearing before the third ALJ, the complete failure of the Connecticut District Court to accord any consideration to the merits of petitioner's claimed aforestated crucial irregularities/deficiencies and the Second Circuit Court of Appeals' sanctioning of the respondent agency's abuse of its process constituted grossly unjustifiable actions committed against petitioner and, ultimately, the general public and society - who are all, truly, at stake in this case. Accordingly, the preservation of the integrity and independence of this appeals process impels the Supreme Court's valuable time to safeguard and protect petitioner, society and the public at large by its imposition of an exercise of said Court's inherent power of supervision. The outright tyranny and undue harrassment must end and the unlawful activities underlying this appeals process, which has truly been the punishment endured by petitioner, must be stopped. Thus, petitioner most respectfully requests the Supreme Court of the United States grant a Writ of Certiorari to review and hear this matter, terminate such illegal, unconscionable and intolerable constitutional abuses existent in this appeals process and, thereafter, enforce recognition of petitioner's constitutional, statutory and regulatory rights with the respondent agency.

Respectfully submitted,

Richard E. Williams
Pro Se

225 Stony Creek Road
Branford, CT 06405
(203) 488-7062

Lynn C. Williams
Wife and Duly Authorized
Lay Representative

225 Stony Creek Road
Branford, CT 06405
(203) 488-7062

Date: May 17, 1984

83-1889

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD E. WILLIAMS,
Petitioner,

vs

SECRETARY OF HEALTH,
EDUCATION & WELFARE,
Respondent.

ON APPEAL FROM THE UNITED STATES COURT
FOR THE SECOND CIRCUIT

PETITIONER'S APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

RICHARD E. WILLIAMS, PRO SE
225 STONY CREEK ROAD
BRANFORD, CONNECTICUT 06405

9'18P

APPENDIX A

UNITED STATES COURT OF APPEAL

SECOND CIRCUIT

No. 83-6139

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of December, one thousand nine hundred and eighty three.

Present:

Hon. James L. Oakes,
Hon. Thomas J. Meskill, Circuit Judges.
Hon. Edward R. Neaher, District Judge.*

Richard E. Williams, ... *Appellant,*

v.

Secretary of Health and Human Services, ... *Appellee.*

N.B Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

ORDER

This is an appeal by Richard E. Williams, pro se, from a judgment of the United States District Court for the District of Connecticut, T. F. Gilroy Daly, Chief Judge, affirming the Secretary's denial of Williams' application for disability insurance benefits. We affirm.

* Of the Eastern District of New York, sitting by designation

This case, as the parties are well aware, has an extensive history and has generated an impressive legal record to accompany its substantial medical record. As is often the case, the passage of time has not resulted in the parties coming any closer together, but rather has seemingly proliferated disputed issues. For purposes of this appeal, however, we are basically confronted with two questions: whether the Secretary's decision was supported by substantial evidence on the record, *Richardson v. Perales,* 402 U.S. 389 (1971), and whether correct legal standards and legitimate processes were employed in reaching that decision.

There is simply no question but that substantial evidence supported the Secretary's decision that Williams was not disabled. While the administrative law judge ("ALJ") acknowledged that the appellant suffered pain and may have been somewhat incapacitated, he also found that Williams' complaints were exaggerated and that he was capable of performing a variety of sedentary jobs, and based these findings on careful consideration of the voluminous medical evidence, including the testimony of numerous doctors who examined Williams. Among the other specific factors relied on by the ALJ were that Williams was capable of taking care of his personal needs during the day when his wife and daughter were away, that Williams had never had surgery or taken major pain medication, as well as Williams' appearance and demeanor at the hearing. While subjective pain may serve as the basis for establishing disability, "the Secretary is not obliged to accept without question" the credibility of a claimant's testimony, and "[t]he ALJ has discretion to evaluate the credibility of a claimant and to arrive at an independent judgment, in light of medical findings and other evidence ..." *Marcus v. Califano,* 615 F.2d 23, 27 (2d Cir. 1979).

In addition, the Secretary also met her burden in establishing that Williams can perform sedentary work. *See Parker v. Harris,* 626 F.2d 225 (2d Cir. 1980). While the opinion of the appellant's treating physician, Dr. DePonte, that Williams was disabled would be binding on the factfinder unless contradicted by substantial evidence to the contrary, *Eidner v. Secretary of Health, Education and Welfare,* 616 F.2d 63, 64 (2d Cir. 1980), there was, in this case, precisely such contradictory evidence, proffered by a number of

doctors, which certainly was adequate to satisfy the Secretary's burden. The ALJ also took affirmative measures to aid in his evaluation of this evidence. As the court below observed, the ALJ did not merely take administrative notice of undemanding jobs which appellant might do, but rather called an expert witness who testified with specificity regarding appellant's ailments and the jobs of a sedentary nature that would be best suited for him.

Williams also makes a number of claims of alleged administrative "procedural deficiencies," and constitutional due process violations. The most serious concern 1) the ALJ's refusal to disqualify himself; 2) the ALJ's refusal to permit Williams' wife to act as a "co-representative" at the hearing; 3) the ALJ's refusal to subpoena certain medical witnesses; and 4) the district court's alleged failure fully to consider all issues raised by appellant below.

The Secretary's decision on disability, from which this appeal is taken, was the product of a remand from the district court in June, 1980. This remand was ordered to clarify and supplement the record and to permit Williams to be represented by counsel. Williams thereafter signed a form authorizing the appointment of his lawyer, who did then represent him at the hearing. It was neither improper nor inappropriate for the ALJ to accept Williams' authorization of his lawyer as his representative and to refuse to allow appellant's wife to serve as a *second* representative.

At the commencement of the hearing counsel withdrew the request for the ALJ's disqualification. The attorney also agreed to the use of interrogatories, rather than insisting on subpoenaing certain witnesses. Needless to say, the actions of Williams' attorney are binding on Williams. *See, e.g., Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962).

Williams' allegations of improper, "Ex-parte" actions by the ALJ are utterly without merit. The ALJ's management of the case—which involved three district hearings and generated a large record—was in all respects proper.

Finally, there is no merit to the argument that the district court violated his due process rights by not discussing all of his contentions

in its written opinion; this has never been necessary. In any event we have considered all of his claims and rejected each one.

Judgment affirmed.

_____

_____

Circuit Judges

_____

District Judge.

APPENDIX B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 83-6139

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of February, one thousand nine hundred and eighty four.

Richard E. Williams, ... *Plaintiff-Appellant,*

v.

Secretary of Health, Education & Welfare, .. *Defendant-Appellee.*

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-appellant, Richard E. Williams, pro-se,

Upon consideration by the panel that heard the appeal, it is,

Ordered that said petition for rehearing is DENIED.

It is further noted that suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by Francis X. Gindhart,
Chief Deputy Clerk

APPENDIX C

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

Name and Address of Claimant:

Richard E. Williams
225 Stony Creek Road
Branford, CT 06405

NOTICE OF DISMISSAL

Please Read Carefully

If you disagree, in whole or in part, with the enclosed order of dismissal, you may request the Appeals Council to review it. However, your request for review must be filed within 60 days following the date shown below.

You, or your representative, may file the request for review at your local social security office, or it may be filed with the hearing

office or the Appeals Council.

This notice and enclosed copy of order of dismissal mailed November 17, 1978.

cc:
Name and Address of Representative:

(none)

APPENDIX D

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

ORDER

In the case of
Richard E. Williams, (Claimant)

Claim for
Period of Disability, Disability Insurance Benefits and Supplemental Security Income

Social Security Number
047-28-0012

The hearing was held on November 7, 1978.

At the hearing the claimant objected to the exhibits being accepted as evidence.

There being no evidence of record, the claimant failed to sustain the burden of proof for his claim; accordingly, the matter is hereby dismissed.

Claimant's objection to the evidence amounted to an oral request at the hearing for a dismissal.

Regulations 404.935 of Title II and 416.1449 of Title XVI of the Social Security Act, as amended, provides that a party may request a dismissal by orally stating such request at the hearing. Where a request for a hearing is withdrawn or dismissed, the findings in the initial or reconsidered determination are final and binding.

Joseph A. Beauchemin
Administrative Law Judge

Bureau of Hearing & Appeals
770 Chapel St., Suite 2F
New Haven, CT 06510

Date: December 17, 1978

APPENDIX E

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

ORDER OF APPEALS COUNCIL
Remanding Case To Administrative Law Judge

In the case of
Richard E. Williams

Claim for
Period of Disability, Disability Insurance Benefits and Supplemental Security Income

Social Security Number
047-28-0012

This case is before the Appeals Council on the claimant's request for review of the administrative law judge's order of dismissal issued on December 17, 1978.

The administrative law judge dismissed the claimant's request for the hearing on the basis that his objections to the exhibits selected by the administrative law judge as evidence for the record constituted a request for dismissal. There is no indication here, however, that the claimant intended such a result. The causes for dismissal are specified in sections 404.935, 404.936, 404.937, 416.1449, 416.1450, and 416.1451 of the Regulations and include a party's application for dismissal *expressly* made orally at the hearing or in writing, abandonment of party, res judicata, no right to a hearing, or hearing request not timely filed. Failure to submit evidence may be a cause for reaching an unfavorable decision because an applicant for disability insurance benefits must "submit medical evidence showing the nature and extent of such individual's impairment or impairments during the time he alleges he was under a disability" (sections 404.1523 and 416.923), but it is not a basis for dismissal.

Here the claimant was willing to testify, and even if the judge wanted to exercise his discretion to sustain claimant's motion not to admit the previously submitted medical evidence into the record, it was the administrative law judge's regulatory obligation to "inquire fully into the matters at issue" and to "receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters" (section 404.927 and section 416.1441). Indeed, if the administrative law judge believes that "there is relevant and material evidence available which has not been presented at the hearing" he may at any time prior to mailing the notice of the decision reopen the hearing for the receipt of such evidence.

It is clear that the administrative law judge did not act in this case in conformance with this hearing procedure.

The Appeals Council notes also that the administrative law judge disqualified the claimant's wife, Lynn C. Williams, as his representative, but the judge failed to provide any specific reason for

such action. Pursuant to sections 404.972 (b) and 416.1503(b), a non-attorney may be appointed to represent a claimant before the Social Security Administration, provided such person "(1) is of good character, in good repute, and has the necessary qualifications to enable (her) to render valuable assistance to an individual in connection with his claim, (2) has not been disqualified or suspended from acting as a representative in proceedings before the Social Security Administration, and (3) is not...otherwise prohibited from acting as a representative..." In the present case, it appears that the claimant is convinced that his wife is qualified to render him valuable assistance in connection with his claim, and there is no evidence that she is otherwise unqualified. If the administrative law judge finds that Mrs. Williams does not meet the Regulatory qualifications, he will have to specify the basis for such a finding.

In light of the foregoing conditions, it is the opinion of the Appeals Council that the administrative law judge's order of dismissal and his disqualification of the claimant's representative were inconsistent with the authority provided in the cited Regulations, and these actions therefore constitute an abuse of discretion.

Accordingly, the Appeals Council grants the request for review and, pursuant to sections 404.938 and 404.950 of Regulations No. 4 and sections 415.1454 and 416.1467 of Regulations No. 16, vacates the administrative law judge's order of dismissal and remands this case for a hearing and decision.

Subsequent to the hearing, the administrative law judge shall issue a decision with notice to the claimant and the representative of the right to request review by the Appeals Council.

APPEALS COUNCIL

_____

Edwin C. Satter, III, Member

_____

David G. Danziger, Member

Date: March 13, 1979

APPENDIX F

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

Name and Address of Claimant:
Richard E. Williams

225 Stony Creek Road
Branford, CT 06405

NOTICE OF DECISION

Please Read Carefully

If you disagree, in whole or in part, with the enclosed decision you may request the Appeals Council to review it. However, your request for review must be filed within 60 days after the date of receipt of this notice. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise.

You (or your representative) may file a request for review at your local social security office or at the hearing office, or you may write or telephone one of these offices and indicate your intention to file a request for review. You may send a written request for review directly to the Appeals Council, Bureau of Hearings and Appeals, SSA, P.O. Box 2518, Washington, D.C. 20013.

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review of your case under section 205(g), 1631(c) (3), or 1869(b) of the Social Security Act.

This notice and enclosed copy of hearing decision mailed May 17, 1979.

cc:
Name and Address of Representative:

Mrs. Lynn Williams
225 Stony Creek Road
Branford, CT 06405

APPENDIX G

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

UPON REMAND BY THE APPEALS COUNCIL
Decision

In the case of
Richard E. Williams, (Claimant)

Claim for
Period of Disability, Disability Insurance Benefits and Supplemental Security Income

Social Security Number
047-28-0012

I. PRIOR PROCEEDING

This case is before the Presiding Administrative Law Judge upon Remand issued March 13, 1979 by the Appeals Council. This remand vacated the prior Administrative Law Judge dismissal,

dated December 17, 1978, of this proceeding. The dismissal was based on failure of the claimant to support his claim through his unwillingness to express himself on the admissibility of exhibits.

In the initial stage of this proceeding, the claimant's wife Lynn C. Williams had been disqualified by the Presiding Judge as the claimant's representative.

The Appeals Council held upon remand that it was not the intent of the claimant to withdraw his claim and that the disqualification of the claimant's wife, as his representative, could not stand without specification of the reasons for the Presiding Judge's action in directing such disqualification.

II. NATURE OF CLAIM

The claimant filed his application for disability benefits on July 28, 1977, based on the contention that he has been unable to work. His work experience consists primarily of a period of employment of seventeen and a half years with an automobile firm as a car washer and polisher. He has also had shorter periods of employment involving routine maintenance and oiling work.

The Hearing was held on May 7, 1979, at which time the claimant appeared with his wife who acted as his representative.

The complainant is 42 years old and has a high school education. He claims a number of physical impairments, including shoulder problems, back pain and difficulty when standing for long periods of time, due among other things, to complaints of pain in his feet, particularly the heels of his feet. He also claims brain damage resulting from an accident that occurred some 22 years ago. His file includes reports and references to visits of a large number of doctors and other medical personnel. He has visited up to thirty-four doctors over a period of many years, and he cites various reports from these doctors, along with reports from his dentist, optometrist, podiatrist and chiropracter, in support of his claim that he is unable to work. He has also visited hospital emergency services to seek

relief from his pains. He has submitted copies of prescriptions that he has received for various drugs, consisting largely of pain relievers.

III. APPLICABLE STATUTES AND REGULATIONS

The laws and regulations to be considered in adjudicating this matter include section 216(i), 42 USC 416(i)(a) of the Social Security Act, as amended, which provides for the establishment of a period of disability, and section 223, 42 USC 423 of the Act, which provides for the payment of disability insurance benefits where the requirements are met. Section 223(d)(1), 42 USC 423(d)(1) of the Social Security Act, as amended, provides that an individual shall be considered to be disabled if he is unable to engage in substantial gainful activity as a result of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

Section 223(d)(2)(A), 42 USC 423(d)(2)(A) of the Social Security Act, as amended, provides that an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do the previous work engaged in, but that considering his age, education and work experience, he cannot engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which the claimant lives, or whether specific job vacancies exist for the claimant, or whether the claimant would be hired if he applied for work. Work which exists in the national economy means work which exists in significant numbers either in the region where the applicant lives or in several regions in the country.

Section 1614(a)(3)(A) of the Act provides essentially the same definition for the term "disability" as that set forth *supra.*

Section 223 (d)(3), 42 USC 423(d)(3) of the Social Security Act, as amended, provides that a physical or mental impairment is an impairment that results from anatomical, physiological or psych-

ological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

Section 223(d)(5), 42 USC 423(d)(5) of the Social Security Act further states that an individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of existance thereof as the Secretary may require. Regulation 404.1503(e) provides that where a finding of disability cannot be made on the basis of the above medical considerations alone, the physical and mental demands of the claimant's past relevant work shall be evaluated. If the impairments do not prevent the individual from meeting the physical and mental demands of past relevant work, disability shall not be found to exist.

IV. SUBPOENA REQUESTS

Prior to the hearing in this proceeding the applicant's wife, acting as his representative, had requested that 52 subpoenas be issued. This included subpoenas for 34 medical personnel and 18 other individuals, including employees of the Bureau of Rehabilitation of the Connecticut Department of Education and other Social Security Administration personnel, who participated in administering Mr. Williams' claim for disability benefits. At the hearing the applicant's representative was requested to explain the need for having these individuals present at the hearing. It is her position that since she disagrees with the conclusions of Drs. Goodman, Zito, and DiLorenzo concerning her husband's conditions as set forth in the reports of these doctors she requested subpoenas for the purpose of having the opportunity of asking these doctors to explain their evaluation of her husband's condition. She stated that action on all other subpoena requests could be deferred, but she did not want to withdraw these requests pending adjudication of her husband's claim.

Her reason in seeking subponas for the non-medical personnel that participated in handling her husband's claim was not made clear at the hearing, but it would appear that since she disagreed with the conclusions of these individuals, and in some instances she

contended that at least one indiviudal showed some bias toward her husband, she felt it would be desirable to have these individuals available for examination.

No subpoenas were issued by the Presiding Judge prior to the hearing pending explanation by the claimant and his representative for the need for these subpoenas.

It is not contended that subpoenas are required for the purpose of presenting new or additional evidence. Further, there is no contention that the reports of the medical doctors are unclear or ambivalent and that clarification is required and that such clarification can be obtained only through cross-examination.

All that is contended is that claimant disagrees with those medical evaluations which are at variance with his claim of disability.

Section 404.926 of the Social Security Administration regulations provides for the issue of subpoenas when "reasonably necessary for the full presentation of a case." This is a matter of discretion to be exercised by the Presiding Judge, and it is not a matter of right upon request of the claimant. Further, the party requesting a subpoena has the obligation to state the pertinent facts which he expects to establish by the subpoenaed witness and whether such facts can be established by other evidence without the use of a subpoena.

The claimant has neither claimed nor demonstrated that facts can be obtained by the requested subpoenas that cannot be obtained by other evidence. As noted *supra,* it is not claimed that additional facts can be adduced by the requested subpoenas.

It is concluded that the claimant has not met the requirements of the foregoing regulation to support the requested subpoenas. This request is denied.

Further subpoena requests relate to records of Dr. Nathan Levy relating to a 1970 left shoulder treatment, and the Connecticut Automotive Trades Association Trust concerning a 1975 treatment for a left knee injury. It is not apparent as to whether such records

exist, and whether if such records exist, they would cast any meaningful light on the claimant's contention of existing disability.

The claimant's medical history is of interest, but the essential issue to be determined is whether he has an existing disability based on a medically determinable disorder within the meaning of the Social Security Act and applicable regulations. These additional subpoena requests are denied.

V. OBJECTION TO EXHIBITS

The complainant, through his representative, objected to several exhibits, particularly those exhibits that reflected adversely on her husband's claim for disability benefits. It was explained to the complainant and his representative that the purpose of this proceeding is to make an independent evaluation of Mr. Williams' claim for disability benefits. The prior Social Security determination that claimant is not disabled is part of the record, and the purpose of the hearing is to provide for a de novo evaluation of this claim.

Therefore, the objection to receipt into evidence of documents, pertaining to prior actions in this proceeding, was not approved. Other objections concerned the medical evaluations with which the complainant did not agree. The request for excluding these documents from the record was not approved; however, the objection was noted and the complainant and his representative were informed that consideration would be given to the arguments made by the complainant and his representative concerning the weight to be given these medical statements.

VI. ADDITIONAL EVIDENCE AND BRIEF

The complainant was also afforded opportunity to file any additional data and exhibits which would support the claim. The complainant was further offered the opportunity to file a brief consisting of a statement outlining his position in support of his claim and such brief was submitted on May 11, 1979.

VII. EVIDENCE AT THE HEARING

Although the matter of various x-rays submitted prior to the hearing was not discussed by claimant during the course of the proceeding, on brief, the claimant requested that these documents be made exhibits. This request is granted so that the claimant will not be precluded from presenting all documents and evidence that he believes will support his position, but it is noted that no medical interpretation of these documents has been offered into evidence.

While it is argued on brief that granting of the requested subpoenas would have permitted interrogation on these x-rays, this had not been advanced as a reason in support of the subpoena requests, and it is not contended that any new evidence could be added to the record in addition to the existing medical reports which are based, in part on evaluation of these x-rays.

Upon detailed and searching analysis of the record of this proceeding the claimant noted some mechanical errors such as listing a medical report as two pages rather than one and missing prescription labels.

Additional documents presented by the claimant at the hearing were made part of the record.

On brief, the claimant lists in detail, additional records in support of the subpoena request for Drs. Goodman, Zito and DiLorenzo. Essentially, the purpose of these subpoena requests is explained as an oportunity to confront and cross examine these doctors because the claimant disagrees with the conclusion of these doctors and questions the validity of their reports.

None of these reasons support granting of the subpoena requests in light of the standards referenced *supra* in the Social Security Administration regulations for the granting of subpoena requests.

At the hearing, the claimant responded to questions asked by the Presiding Judge with a reasonable degree of intelligence. It was noted that the claimant brought a friend who operated a tape recorder so that the claimant could have his own tape recording and

the claimant assisted his friend in operating the controls of the tape recorder and by showing how the tape recorder should be handled. However, after the tape was to be changed a second time, the applicant refrained from offering physical assistance and restricted his assistance to verbal instructions.

The claimant stated that he is somwhat overweight. His present activities are described as limited, consisting largely of watching television. He states that he is unable to bend sufficiently to put on his socks and requires assistance from his wife in dressing himself. He states further that he participates in no household duties whatsoever and is almost constantly in pain. The pain appears to exist in virtually all parts of his body, resulting in restriction of his activities. He formerly was reasonably active in work around the house. He mentioned that 10 years ago he had painted his house and had used ladders or possibly staging for that purpose.

VIII. RECORD EVIDENCE

The various medical evaluations included in this record concur that claimant may have some degree of physical disability, particularly in his left shoulder. It is noted that he has visited a large number of medical doctors and numerous evaluations were made at different times of his various complaints.

He has seen Dr. DePonte on many occasions. At a July 10, 1978 examination Dr. DePonte took note of the presence of cervical ribs which could be corrected by an operation. Complaints of pain in Mr. Williams' left and right heels were attributed by Dr. DePonte to a spur in the left heel, which was disclosed by x-rays at an October 16, 1978 examination. Dr. DePonte suggested that Mr. Williams should wear shoes with higher heels and arch support inserts and should experiment with a heel cup and shoe lifts. Dr. DePonte noticed no appreciable limp in Mr. Williams' gait.

In an examination of July 19, 1978, Dr. Shutkin noted that Mr. Williams had complained of various pains over a period of a year consisting largely of the left shoulder, low back pain and pain in his feet. Dr. Shutkin noted that Mr. Williams moves freely and easily

and no active pathology was evidenced. He determined that a 10 percent disability in the left shoulder would appear to be present. He found that no symptoms were disclosed by tests to support the presence of bilateral cervical ribs.

In an examination of April 10, 1978 Dr. Poverman found a 15 percent disability in Mr. Williams' left arm.

At the hearing a good deal of stress was placed by Mrs. Williams on a statement dated January 11, 1979 by Dr. DePonte in the form of a letter to Joseph Chiarelli, Esq., 1324 Dixwell Avenue, Hamden, Connecticut. This letter (Exhibits AC-4) states as follows:

> "It is my opinion that Mr. Williams, as a result of his miltiple systems disorders, including his chronic tendenitis, his bilateral cervical ribs, his chronic plantar fasciitis and thoracic outlet syndrome, is essentially completely disabled from performing any type of useful occupation requiring the use of the upper extremities. The chronic fasciitis would make any occupation requiring that he stand or walk any distances virtually impossible.
>
> "It is my impression that this disability was present in February 1977 and continued through the present."

It is noted that this January 1979 statement differs in some measure from Dr. DePonte's earlier evaluations of July 10, 1978 and October 16, 1978.

The complainant stated at the hearing in response to interrogation, that he had not seen a doctor since December of 1978 because there has been no change in his condition. He called Dr. DePonte from time to time to arrange for renewal of his prescriptions for drugs that he understands are required to relieve his pain. Reports of other physicians, including Dr. Alvin Greenberg, Dr. Zito and Dr. Goodman concur in the conclusion that there is no motor deficit or sensory deficit in either of Mr. Williams' legs. There is some poor fine dexterity of the right hand which is related to a head injury sustained some twenty years ago.

Further reports, including a report by Dr. Zito, state that a neurological examination was essentially unremarkable and concludes that the complainant's complaint of chronic low back pain may be due to congenital malformation but there is no clear neurological deficit related to his complaints of pain. The accompanying residual functional capacity report submitted by Dr. Zito states that the complainant is capable of doing light work and sedentary work and can perform those functions which are necessary to carry out such work except that he is unable to stoop, kneel, crouch or crawl. He can do some reaching, handling, fingering and feeling.

It is noted that the complainant, through his representative, takes exception to this report and that he would have this report excluded from the record. A further report by Dr. Allen Goodman states that examination of the claimant's lower extremities was unremarkable with respect to muscle strengths, sensation and reflex activity. While x-rays showed some degeneration of the spinal disc, there was no indication that the condition of the spine or the right shoulder disabled the claimant and made it impossible for him to carry out a large number of gainful occupations.

At the hearing the complainant wore a foam rubber cervical collar around his neck. He stated this assisted him in relieving his pain. As noted *supra*, he had not seen a doctor concerning this matter since December 1978.

Evaluation has been made of the medical evidence of this record to determine insofar as possible the precise degree of functional loss or restriction that results from the claimant's physical impairments. It is the extent of the limitation of the complainant's ability to engage in physical activity such as sitting, walking, reaching, manipulating and to perform other functions that determine the true severity of his impairment. It is through an assessment of these capacities and capabilities that a meaningful decision can be made with respect to his ability to engage in substantial gainful activity.

To support a determination of disability as defined by the Social Security Act an allegation of functional limitations must be medically

determinable as the result of organic dysfunction, or other demonstrable causes. Section 1614(a)(3)(c), 46 USC 1382(c)(a)(3)(c) of the Social Security Act, and section 416. 901(c), 20 CFR 416.901(c) of the Social Security Administration Regulations state that a physical or mental impairment is an impairment that results from anatomical, physiological or psychological abnormalities which are demonstrable by medically accepted clinical and laboratory diagnostic techniques.

Statements of the claimant including claimant's own description of impairments are alone insufficient to establish the presence of a physical or mental impairment. The validity of the claimant's allegation of inability to work for any period of time and his subjective complaints can be accepted only insofar as the complaints are supported by clinical and laboratory diagnostic techniques. The evidence must not only show a continuous impairment preventing performance of the claimant's usual occupation, but must also show the lack of residual capacity to perform other occupations within a vocational potential. Thus, the residual capacity the claimant has for work activity is the controlling feature. Therefore, the Presiding Judge must objectively examine the clinical, laboratory and other evidence to determine if impairments exist and to what extent these impairments may interfere with the claimant's normal physical and mental functioning.

The record in this proceeding is voluminous and is noted that it includes a large number of medical reports, evaluations and other document pertaining to the claimant's medical history.

IX. EVALUATION OF EVIDENCE

Review of the entire record of this proceeding supports the conclusion that although the complainant may have sustained some impairment of his ability to use his hands and his arms, he is not completely disabled within the meaning of statute and the Social Security Regulations. In reviewing the evidence of this proceeding in a light most favorable to the applicant's claim of disability, careful consideration has been given to the January 11, 1979 statement of Dr. DePonte, in which emphasis was given to the difficulty encountered by Mr. Williams in using his upper extremities.

A Vocational Expert, Dr. James M. Brine, was present at the hearing at the request of the Presiding Judge. Following the presentation of testimony on behalf of Mr. Williams, the vocational expert was asked a number of hypothetical questions to determine whether jobs existed in the national economy which an individual with impairments similar to those claimed by the complainant could perform. While, on the one hand, the vocational expert determined that if Mr. Williams had all the problems he complained of, there was no job he could perform; on the other hand, the vocational expert stated that the January 11, 1979 report of Dr. DePonte did not disqualify the complainant from fulfilling such jobs as a gatetender, parking lot attendant, or similar semi-sedentary types of work which did not require a great deal of standing, involved simple record keeping and that an individual that has limited use of his hands and arms was qualified to perform jobs of this nature.

X. FINDINGS

The complainant filed an application for disability insurance benefits on July 28, 1978. He has met the special earnings requirements of the Social Security Act as amended as of the date of his alleged disability and he continues to meet them as of the date of the hearing and the date of this decision. The evidence fails to support the claimant's contention that his impairments prevent him from engaging in any substantial gainful activity for any continuous period beginning on or before the date of his application, and which has lasted or could be expected to last for at least 12 months.

Consideration has been given to the claimant's claims alleging injuries and impairments in various parts of his body, including brain damage and many physical ailments.

Interrogation of the witness at the hearing did not disclose evidence of any mental impairment. The claimant responded intelligently and lucidly to all questions.

On brief, a list of seven impairments is presented. While as noted *supra*, some impairment can be deemed to exist in the applicant's

left shoulder and arm, the evidence of this proceeding does not support the conclusion that the various claims of impairment advanced by the claimant are medically determinable as constituting disability of the claimant to engage in any gainful activity. Claimant appears to be robust with unrestricted use of his faculties and being fully aware of all circumstances of the hearing.

The claimant relies on Dr. DePonte's statement of January 11, 1979, in support of his claim of total disability. As noted, this statement differs from the prior medical reports of the claimant's condition prepared by Dr. DePonte. These earlier reports were written at the time that Dr. DePonte examined the claimant. The January 1979 statement was submitted in the form of a letter to an attorney. The relationship of the attorney to this case was not explained; no explanation was offered as to why this letter was written to this attorney; and further, no explanation was offered to justify the apparent inconsistency between the January 1979 statement and the earlier medical reports of Dr. DePonte, in which only limited impairment of the claimant's physical capabilities was found to exist.

The fact is that notwithstanding Mr. Williams's numerous and varied claims of pain and physical discomfort, and his recitation of injuries and ailments that extend over a period of some 22 years, the record evidence does not support his claim that he is unable to engage in substantial gainful activity. Medically determinable physical or mental ailments which result in total disability and which can be expected to result in death or which lasted or can be expected to last for 12 consecutive months, are not found.

The January 11, 1979 Dr. DePonte statement does not support the claimant's contention of total disability. The expert vocational testimony discloses that gainful employment exists for individuals with limited use of their arms and hands.

It is concluded that the additional evidence submitted following the Appeals Council Remand, even when viewed in a light most favorable to claimant, does not support his claim of total disability under the Social Security Act.

The claimant has not been prevented from engaging in any substantial activity and upon consideration of his physical and mental ability, his age, education and work history, he is able to do jobs as indicated by the vocational expert in answer to hypothetical questions presented, and such jobs are available as testified by the vocational expert in regions where the claimant lives and several other regions of the country. It is concluded further, that the complainant was not under a disability as defined in sections 216(i), 223(d), 1614, (42 USC 416(i) 423 and 1614) of the Social Security Act, as amended, on the date of filing of his applications for disability insurance benefits and Supplemental Security Income and continuing through the date of this decision.

XI. DECISION

It is the decision of the Administrative Law Judge that the claimant's request for Disability Insurance Benefits and Supplemental Security Income has not been demonstrated by persuasive evidence and that he is not entitled to a period of Disability Insurance Benefits, or Supplemental Security Income benefits under the Social Security Act, as amended. This claim should be and herewith is denied.

.....

Samuel Kanell
Presiding Administrative Law Judge

Date: May 17, 1979

APPENDIX H

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
P.O. BOX 2518
WASHINGTON, D.C. 20013
OFFICE OF HEARINGS AND APPEALS

SG-2
REFER TO:

047-28-0012
September 13, 1979

Action of Appeals Council on Request for Review

In the case of
Richard E. Williams

225 Stony Creek Road
Branford, CT 06405

Dear Mr. Williams:

Re: Your Claims for Disability Insurance Benefits and Supplemental Security Income

After the request for review of the hearing decision was received, a careful study was made of your case, the applicable law and regulations, the record before the administrative law judge, the additional evidence submitted, and the contentions made in support of the request.

Sections 404.947a and 416.1465 of Social Security Administration Regulations Nos. 4 and 16 (20 CFR 404.947a and 416.1465) provide that the Appeals Council will review a hearing decision where: (1) there appears to be an abuse of discretion by the

administrative law judge; (2) there is an error of law; (3) the administrative law judge's action, findings, or conclusions are not supported by substantial evidence, or (4) there is a broad policy or precedural issue which may affect the general public interest. These sections also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

The Appeals Council has concluded that there is no basis under the above regulations for granting the request for review. Accordingly, the hearing decision stands as the final decision of the Secretary in your case.

In reaching this conclusion, the Appeals Council considered the contentions made by your representative in the brief filed on your behalf and the additional evidence submitted in connection with your request for review. Much of the new evidence consists of copies of prescriptions, bills, receipts, and information from physicians which essentially repeats information already of record. In June 1979 you saw a chiropractor for back pain, and he reports that X-rays reveal no substantial change over X-rays taken in May 1976. A physician saw you in July 1979 regarding the scar on your left arm. The additional evidence provides no clinical or laboratory findings which would warrant any further administrative action. The Council finds that the weight of the evidence supports the administrative law judge's decision.

If you desire a court review of the hearing decision, you may commence a civil action in the district court of the United States in the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless or reasonable showing is otherwise made. See sections 205(g) and 1631(c)(3) of the Social Security Act, as amended [42 U.S.C. 405(g) and 1383(c)(3)) and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If a civil action is commenced, the Bill of Complaint should name the Secretary of Health, Education, and Welfare as the defendant and should include the social security number(s) shown at the top of this notice.

Sincerely yours,

Edwin C. Satter III
Member, Appeals Council

cc:
Mrs. Lynn Williams
Branford, CT 06405

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
CIVIL NO. N-79-338

RICHARD E. WILLIAMS, **Plaintiff**

VS.

PATRICIA R. HARRIS,
Secretary of Health, Education and Welfare, **Defendant**

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

In this proceeding for judicial review of the defendant Secretary's denial of disability-linked benefits claimed by plaintiff under the Social Security Act, the Court's limited function is not to retry the merits *de novo*, see, e.g., *Bastien v. Califano*, 572 F.2d 908, 912 (2 Cir. 1978), but instead to determine whether the Secretary's findings

are supported in the record of administrative proceedings by "substantial evidence", 42 U.S.C. § 405(g) — i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conculsion", *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Remand for administrative reconsideration, however, is also authorized by the review statute for "good cause", § 405(g), and that course seems warranted here to assure both fully informed and unambiguous administrative decision.

The benefit claim before the Secretary turned on the existence of "disability", meaning for present purposes an

> "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months".

42 U.S.C. § 423 (d) (1) (A). As that definition is clarified by § 423(d) (2) (A), moreover, plaintiff would be found disabled

> "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any kind of substantial gainful work which exists in the national economy".

Plaintiff is a middle-aged man, high school graduate long employed washing and polishing cars for a dealer, who now asserts inability to do any useful work due to a host of professed ailments and associated pain. There is little or not doubt that he has physical impairments — e.g., seeming shoulder tendinitis — but the question is whether he suffers from any condition or conditions of disabling severity.

As already stressed, the Secretary is the trier of fact, with her findings conclusive if supported by substantial evidence, see 42 U.S.C. § 405(g). She must accordingly exercise the trier's necessary

authority in resolving uncertainties or conflicts and in assessing persuasive weight of proofs; this Court is not free simply to substitute its judgment for hers in such matters. On the other hand, the administrative trier must of course apply correct legal standards in evaluating the facts, see, e.g., *Marcus v. Califano*, 615 F.2d 23 (2 Cir. 1979), and the manner in which decision was reached in this instance prompts serious question in certain respects.

Foremost perhaps is the treatment of allegations of pain. Despite an array of claimed problems, attendant medical records, and reports of varying utility from numerous physicians, the central and potentially dispositive complaint is of pain. As noted by the Secretary's vocational expert witness at the administrative hearing, to believe plaintiff's testimony fully would seem to rule out work. Interestingly enough, plaintiff's complaints (e.g., "chronic low back pain") appear to have been credited — in uncertain degree — by a physcian to whom he was referred by the Secretary for neurological examination, Dr. Zito. An orthopedic surgeon, however, Dr. Goodman, found on his referral exam insufficient objective indications of severe impairment. Neither of these reports is mentioned now as necessarily illustrative of the weight of the evidence, but their very existence underscores significant ambiguity in the Secretary's present generally couched findings. On prior occasions, the Secretary has mistakenly relied on a fundamentally erroneous legal premise that "subjective" claims of disabling pain *must* be denied unless there is manifestly "objective" clinical foundation, see, e.g., *Marcus* v. Califano, supra; the current absence of explicit credibility analysis in the light of plaintiff's hearing testimony and of the medical proofs' relative weights does impel remand for clarification, cf. *Seaborne v. Secretary of H.E.W.*, Civil No. N-78-370 (D. Conn. 1980).

In addition, it is not now at least self-evident that the Secretary's written decision does reflect the limited threshold concession intimated by government counsel's brief in the latter's assertion that

> "[w]hile plaintiff's shoulder obviously precludes him from returning to his former work as a car washer, it seems sufficiently clear from the physicians' functional assessments that he is capable of performing the work of a less strenuous nature".

The immediate difficulty once more is vague discussion in lieu of precise finding, rendering the review process overly s[illegible]culative, cf. *Small v. Califano*, 565 F2d 797, 800-801 (1 Cir. 1977).

Assuming that the Secretary's sense of the evidence was indeed that the customary prior line of work was foreclosed, an important conclusion in turn compelling affirmative government evidence "to show that there is other work that the claimant is able to perform", *id.* at 800, her vocational witness did think a light task such as that of "a parking lot attendant" was possible on the favorable hypothesis voiced by hearing judge that plaintiff "could stay at a job for 7 to 8 hours per day". The source of that "hypothetical" element is not pin-pointed, although Dr. Zito's report included his return of a "residential functional capacity" questionnaire, a form which states in parenthesis that it is "based on 8 hour work day", and he did check off "sedentary" and "light work" *strength* categories. As previously remarked, however, Dr. Zito also mentioned plaintiff's pain, and indeed observed that the matter of "chronic low back pain needs further workup"; it is not patent that Dr. Zito would underwrite the hypothetical employed, or even regard his own views settled. It bears comment that the hypothetical did also assume that pain "may come and go", surely not conceded, and that the vocational witness himself later suggested that he did not have enough information to take the back problem into account.

Such uncertainties impel more general comment. Despite the *potential* force of medical evidence as proof, cf. *Alvarado v. Califano*, 605 F.2d 34 (2 Cir. 1979), the now-existing record is unexpectedly obscure and undeveloped in view of its sheer bulk. While plaintiff was tenaciously assisted at the administrative stage by his wife, an articulate lay representative, it is not surprising that the evidence lacks cogent focus when it is considered that the couple lacked an attorney's guidance in presenting testimony and eliciting pertinent opinion in persuasive context. Although the claimant does logically retain "the ultimate burden of persuasion", *Franklin v. Secretary of H.E.W.*, 393 F.2d 640, 642 (2 Cir. 1968), the Secretary in such circumstances is charged with a settled "affirmative obligation to assist. . .in developing. . .[the claimant's] case", *Eiden v. Secretary of H.E.W.*, F.2d , slip op. 1519, 1523 (2 Cir. Feb. 29, 1980).

It is difficult to conclude that this duty was met here — not because of official refusal to employ seldom-used hearing subpoena power as desired by plaintiff to bring in a host of witnesses, but because clarifications and focused medical opinion could have been readily enough elicited by report. If surely understandable, for example, the Secretary's evident practical skepticism concerning a rather conclusory supporting statement by a former treating physician, Dr. DePonte, could have been confirmed or dispelled by follow-up inquiry, and an attorney presumably would have sought to present such appropriate context or explanation. The conceivable impact of persuasively articulated medical opinion is obvious.

All this is by no means to suggest that plaintiff must eventually prevail; the merits, again, are for the administrative trier to evaluate. This record does require clarification, however, and in the overall circumstances not merely through requesting elaborated findings. Now ably represented by counsel in this technical realm of suit, plaintiff should be given rehearing opportunity to supplement and clarify the record through such additional testimony and further exhibits deemed reasonably necessary by counsel, lest the diffuse character of earlier proceedings impede final assessment of the claim.

The pending cross-motions for summary judgment are accordingly denied without prejudice on the existing record. Plaintiff's alternative request for remand is granted, and the instant matter is hereby ordered remanded to the Secretary for prompt scheduling of rehearing opportunity.

Dated at New Haven Connecticut, this 28th day of May 1980.

ARTHUR H. LATIMER
UNITED STATES MAGISTRATE

APPENDIX J

June 13, 1980 — The ruling on the parties cross-motions for summary judgment is SO ORDERED, substantially for the reasons set forth in Magistrate Latimer's well-reasoned opinion. It should also be noted that neither party has submitted an objection to the Magistrate's ruling pursuant to Local Rule 2 for U.S. Magistrates, as amended, March 11, 1980.

T.F. Gilroy Daly, U.S.D.J.

APPENDIX K

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

ORDER OF APPEALS COUNCIL
Remanding Court Case To Administrative Law Judge

In the case of
Richard E. Williams

Claim for
Period of Disability, Disability Insurance Benefits and Supplemental Security Income

Social Security Number
047-28-0012

The United States District Court has remanded this case to the Secretary of Health and Human Services for further administrative action. Therefore, the Appeals Council vacates its denial of the claimant's request for review and the decision of the administrative law judge and remands this case to and administrative law judge for further proceedings consistent with the Order of the Court. In addition, the administrative law judge shall take such further action

that may be necessary to complete the administrative record. Upon completion of all proceedings, the administrative law judge shall return the case with a recommended decision to the Appeals Council for its decision.

The claimant and attorney shall be given the opportunity to file with the Appeals Council, within 20 days from the date of notice of the recommended decision, briefs or other written statements of exceptions and comments as to applicable facts and law. After the 20-day period has expired, the Appeals Council will review the record and issue its decision.

APPEALS COUNCIL

_____

Harriet A. Simon, Member

_____

Roland L. Vaughan, Jr., Member

DATE: August 4, 1980

APPENDIX L

DEPARTMENT OF
HEALTH, AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

Richard E. Williams
225 Stony Creek Road
Branford, CT 06405

NOTICE OF RECOMMENDED DECISION
Of Administrative Law Judge On Court Remand

PLEASE TAKE NOTICE that, pursuant to the Appeals Council's order of remand, dated August 4, 1980, there is enclosed herewith the administrative law judge's findings of fact, conclusions of law, and recommended decision.

You are hereby notified of your right to file briefs or other written statements of exceptions and comments as to applicable facts and law. Any such briefs or written statements should be sent *within 20 days from the date shown below to the Appeals Council*, Attention: Division of Civil Actions, Office of Hearings and Appeals, SSA, P.O. Box 2931, Washington, D.C. 20013. Any request for an extension of time will be granted, at the discretion of the Appeals Council, upon a showing of good cause.

After the time granted for filing briefs and written statements has expired, the Appeals Council will review the record and issue its decision.

This notice and enclosed copy of findings of fact, conclusions of law, and recommended decision, mailed July 24, 1981

CC: Robert M. Carale, Esquire
250 West Main Street
Branford, CT 06405

APPENDIX M

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

RECOMMENDED DECISION

In the case of
Richard E. Williams, (Claimant)

Claim for
Period of Disability And Disability Insurance Benefits

Social Security Number
047-28-0012

PROCEDURAL BACKGROUND AND HISTORY

This case has a lengthy procedural history. On July 28, 1977, the claimant Richard E. Williams filed an application for disability insurance benefits (Exhibit 1), in which he alleged disability since February 28, 1977. This application was denied upon initial and reconsidered determinations. The claimant thereupon requested a hearing before an Administrative Law Judge. On November 7, 1978, such hearing commenced before an Administrative Law Judge who disqualified the claimant's wife Lynn C. Williams from acting as the claimant's representative and dismissed the claimant's request for a hearing. Acting upon the claimant's request for review, the Appeals Council, in an order of March 13, 1979, vacated the Administrative Law Judge's Dismissal and remanded the case for a hearing and decision. Such hearing was held before another Administrative Law Judge on May 7, 1979. Pursuant to his decision dated May 17, 1979, the Appeals Council denied the claimant's request for review of this decision, and the claimant thereupon sought judicial review. Pursuant to its order dated June 13, 1980, the United States District Court for the District of Connecticut remanded the case to the Secretary for a rehearing. The Magistrate's ruling stressed that:

1. remand for clarification was impelled by an absence of explicit credibility analysis with respect to the claimant's testimony, including his allegations of pain;

2. more precise findings concerning the claimant's ability to perform his customary or alternative work were necessary;

3. clarification of vocational testimony was needed;

4. the record was unexpectedly obscure and undeveloped in view of its sheer bulk;

5. now ably represented by counsel, the plaintiff (claimant) should be given rehearing opportunity to supplement and clarify the record.

On August 4, 1980, the Appeals Council remanded the case to an Administrative Law Judge for further proceedings consistent with the Order of the Court, including the issuance of a recommended decision. A pre-hearing interview was held on September 11, 1980. After a consultative examination was held and a revised workable List of Exhibits was agreed upon, with claimant's counsel, the hearing was held before the undersigned in New Haven, Connecticut, on January 6, 1981. The claimant appeared represented by his attorney of record Robert Casale. The claimant's wife Lynn Williams testified on his behalf. Testifying as a vocational expert was Dr. James K. Phillips, a licensed psychologist.

The claimant alleges disability due to multiple medical impairments which are discussed at length below. He is now 45 years old, and is a high school graduate. His only vocationally relevant past work experience was at an unskilled position of car washer and polisher.

ISSUES

The general issues before the Administrative Law Judge are whether the claimant is entitled to a period of disability and to disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act, as amended. The specific issues are

whether the claimant was under a "disability," as defined in the Act, and, if so, when such "disability" commenced and the duration thereof, and whether the special earnings requirements of the Act are met for the purpose of entitlement.

LAW AND REGULATIONS

Section 216(i) of the Social Security Act [42 USCA §416 (i)] provides for the establishment of a period of disability, and Section 223 of the Act [42 USCA §423] provides for the payment of disability insurance benefits where the requirements specified therein are met.

Section 223(d) (1) of the Social Security Act [42 USCA §423 (d) (1)] defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."

Section 223(d) (2) (A) [42 USCA §423 (d) (2) (A)] further provides that an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are "of such severity that he is not only unable to do his pervious work but cannot, considering his age, education, and work experience, engage in any kind of substantial gainful work which exists in the national economy."

Section 223(d) (3) [42 USCA §423 (d) (3)] defines a "physical or mental impairment" as an impairment that results from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

Section 404.1520(d) of the Social Security Regulations No. 4 [20 CFR §404.1520(d)] provides that if you have an impairment which meets the duration requirement and is listed in the Listing of Impairments in Appendix 1 to Subpart P of the Regulations No. 4, or we determine that your impairment is equal in severity and

duration to one of the listed impairments, we will find you disabled without considering your age, education, and work experience.

Section 404.1520(f) of the Regulations No 4 [20 CFR §404.1520(f)] provides that if you cannot do any work which you have done in the past because you have a severe impairment, then we will consider your residual functional capacity and your age, education, and past work experience to determine if you can do any other work. If you cannot do other work, then we will find you disabled.

Section 404.1561 of the Regulations No 4 [20 CFR §404.1561] further provides that any other work that you can do, given your residual fuctional capacity and your age, education, and past work experience, must exist in significant numbers in the national economy (which includes the region where you live or several other regions of the country). Section 404.1566 of the Regulations No. 4 [20 CFR §404.1566] provides that when we consider that work exists in significant numbers in the national economy, it does not matter whether; (1) work exists in the immediate area in which you live, (2) a specific job vacancy exists for you, or (3) you would be hired if you applied for work.

Section 404.1545(a) of the Social Security Regulations No 4 [20 CFR †404.1545(a)] provides that your residual functional capacity is what you can still do despite the physical and metal limitations caused by your impairment or combination thereof. Residual functional capacity is a medical judgment; however, it may include descriptions (even your own) of limitations which go beyond the symptoms that are important in the diagnosis and treatment of your medical condition. Observations of your work limitations in addition to those usually made during formal medical examinations may also be used.

With regard to physical abilities, Section 404.1545(b) of the Regulations No. 4 [20 CFR §404.1545(b)] states that, "When we assess your physical abilities (e.g., strength) we assess the severity of your impairment(s) and determine your residual functional capacity for work activity on a regular and continuing basis. We consider

your ability to carry out physical activities such as walking, standing, lifting, carrying, pushing, pulling, reaching, handling and the evaluation of other physical functions."

With regard to mental impairments, Section 404.1545(c) of the Regulations No. 4 [20 CFR §404.1545(c)] states that, "When we assess your mental disorder, we consider factors such as your ability to understand, to carry out and remember instructions,and to respond appropriately to supervision, co-workers, and work pressures in a work setting."

Section 404.1545(d) of the Regulations No. 4 [20 CFR §404.1545(d)] provides that, "Some medically determinable impairments, such as skin impairments, epilepsy, and impairments of vision, hearing or other senses, postural and manipulative limitations, and environmental restrictions do not limit physical exertion. If you have this type of impairment, in addition to one that affects physical exertion, we consider both in deciding your residual functional capacity."

Section 404.1567 of the Regulations No. 4 [20 CFR §404.1567] states that to determine that physical exertion requirements of work in the national economy, we classify jobs as "sedentary," "light," "medium," "heavy," and "very heavy". These terms are specifically defined in Section 404.1567.

Section 404.1568 of the Regulations No. 4 [20 CFR §404.1568] provides that in order to evaluate your skills and to help determine whether there is any work in the national economy which you may be able to do, occupations are classified as "unskilled," "semi-skilled," and "skilled". These terms are specifically defined in Section 404.1568.

Section 404.1568(d) of the Regulations No. 4 [20 CFR §404.1568(d)] states that we consider that you have skills that can be used in other jobs when the skilled or semi-skilled work activities which you did in your past work can be used to meet the requirements of skilled or semi-skilled work activities of other jobs. It is further stated that transferability of job skills depends largely on

the similarity of occupationally significant work activities between different jobs and that transferability of skills is most probable and meaningful among jobs in which (1) the same or a lesser degree of skill is required, (2) the same or similar tools and machines are used, and (3) the same or similar raw materials, products, processes, or services are involved. A complete similarity of all three factors is not necessary for transferability to exist; however, when skills are so specialized or have been acquired in such an isolated vocational setting that they are not readily usable in other industries, jobs and work settings, we consider that such skills are not transferable.

Section 404.1569 of the Regulations No. 4 [20 CFR §404.1569] discusses Appendix 2 to Subpart P which sets forth rules which use data concerning job classification by exertional and skill requirements from the Dictionary of Occupational Titles and which reflect major functional and vocational patterns. We apply these rules in cases where a person is not doing substantial gainful work and is prevented by a severe medically determinable exertional impairment from doing vocationally relevent past work. If the findings of fact made about all factors coincide with a rule, we will use that rule to decide whether a person is disabled.

Furthermore, Section 404.1569 states that the rules in Appendix 2 do not cover all possible variations of factors. The rules are not applied if one of the findings of fact about the person's vocational factors (e.e., age, education, vocationally relevant past work experience, and transferability of skills) and residual functional capacity is not the same as the corresponding criterion of a rule. In such an event, full consideration is given to all the relevant facts in accordance with the definitions and discussions under vocational considerations (see Sections 404.1560 through 404.1568 of the Regulations No.4).

Section 200.00(e) of Appendix 2 to Subpart P of the Regulations No. 4 provides that since the Appendix 2 rules are predicated on an individual's having an impairment which manifests itself by limitations in meeting the strength requirements of jobs, they may not be fully applicable where the nature of an individual's impairment does not result in such limitations, e.g., certain mental, sensory, or skin

impairments. In addition, some impairments may result solely in postural and manipulative limitations or environmental restrictions.

Section 200.00(e) (2) of Appendix to Subpart P of the Regulations No. 4 provides that where an individual has an impairment or combination of impairments resulting in both strength limitations and non-exertional limitations, the rules in this subpart are considered in determining first whether a finding of disabled may be possible based on the strength limitations alone and, if not, the rule(s) reflecting the individual's maximum residual strength capabilities, age, education,and work experience provide a framework for consideration of how much the individual's work capability is further diminished in terms of any types of jobs that would be contraindicated by the non-exertional limitations. In such situations, full consideration must also be given to all relevant factors as set forth in sections 404.1560 through 404.1568 of the Regulations No. 4.

SUMMARY OF THE MEDICAL EVIDENCE

On January 29, 1957, the claimant was admitted to the Grace New Haven Community Hospital after apparently being involved in an automobile accident. He had amnesia from the accident and was reported to be sleepy but was pretty well oriented. The diagnostic impression was of a cerebral contusion accompanied by lacerations of the right forehead. The claimant's condition showed gradual improvement and no severe symptoms were exhibited. He was discharged on February 1, 1957 (Exhibit 14).

The claimant was followed by Dr. Nathan Levy of Branford. On February 11, 1957, Dr. Levy noted that the claimant had been referred to a Dr. Davey who felt that he had a contusion of the brain on the left side or a possible subdural hematoma.

A report of Dr. Davey's neurological consultative examination is set forth as Exhibit 16. Dr. Davey noted that he saw the claimant on February 11, 1957, for an evaluation of right hemiparesis. It was his impression that the claimant had sustained a cerebral contusion affecting primarily the arm and speech areas. In view of what was termed the patient's progressive improvement, Dr. Levy recommended continued conservative management. However, he did state

that the claimant's condition should be closely monitored to make sure that no signs of subdural hematoma developed. If the claimant's condition were one of improvement, Dr. Davey stated that nothing further needed to be done except mild physiotherapy at home (Exhibit 16). In a report of March 14, 1957, Dr. Levy expressed his belief that the claimant was making good progress but that it could be some time before he was able to return to work. In a further report of April 15, 1957, Dr. Davey noted the claimant's continued improvement. He revised his diagnostic opinion somewhat to state that the claimant has sustained bilateral damage in the cerebral hemispheres and that the dysarthria which he still showed was of the sudobulbar type.

In a report of December 5, 1957, Dr. Levy noted that as of the date of the claimant's last visit of November 19, 1957, he still limped and still had a speech defect. It was Dr. Levy's impression that the claimant would always have some speech defect as well as a limp in his walking (Exhibit 17).

In an updated report (Exhibit 18), Dr. Levy noted that he had been treating the claimant since his automobile accident of January 29, 1957, and that as a result of this accident, the claimant had incurred permanent disability to his speech and to the right side of his body.

On April 24, 1961, Dr. Allen Minor provided a medical interpretation of an X-ray examination of the claimant's lumbosacral spine. Dr. Minor's impression of the X-ray was that it was of a negative study except for rudimentary twelfth ribs in bilateral sacralization of L-5 (Exhibit 21).

On September 11, 1967, an unidentified chiropractor noted his treatment of the claimant on August 29, 1967, for lumbar radiculitis with a slight sciatic neuritis. The chiropractor concluded that further treatment would not be required, and the claimant had suffered no work loss (Exhibit 27).

On September 20, 1974, the claimant was seen in the emergency room of the Yale-New Haven Hospital. He was complaining of severe pain in the left shoulder, and it was noted that he had a two-year history of pain in the left shoulder (Exhibit 29).

Exhibit 31 is a report of attending physician Harold Levy attesting to the fact that in August, 1975, the claimant had undergone surgical repair of a wound to his right knee. The injury was, in fact, sustained to the claimant's left knee (Exhibit 30).

In a report dated April 6, 1977 (Exhibit 32), chiropractor William J. Seery stated that he had seen the claimant on May 19, 1976, at which time the claimant was complaining of severe low back pain and partial immobility of the lower back. The claimant further stated that he had these symptoms since sustaining a lifting injury on the job the previous day. Upon Dr. Seery's examination, the claimant was observed to have diffculty walking into the office and palpation of the lumbar spine revealed severe spasm. X-rays were termed consistent with muscle spasm and early degenerative disc disease in the lower lumbar segments. The initial diagnosis was of an acute severe lumbar sprain with resulting muscle spasm and limitation of range of motion. The claimant was treated with manipulation on 12 office visits following the initial examination of May 19, 1976. He responded well to therapy and was able to resume light duty on June 7, 1976. The claimant was last seen by chiropractor Seery on June 18, 1976, at which time he reported being asymptomatic. The claimant was advised to wear a lumbar support. In Dr. Seery's opinion, the resolution of the injury resulting from the accident appeared complete at the time of discharge and no functional diability remained at the time. However, evidence of degenerative disc disease was apparent on X-ray examination which obviously pre-existed the acute lumbar sprain for which the claimant was treated.

On February 14, 1977, the claimant was seen by orthopedist Ralph DePonte with primary complaints of pain in the left shoulder. After examination and review of the X-rays, Dr. DePonte concluded that the claimant's signs and symptoms were compatible with a bicipital tendinitis. The shoulder was injected with Steroids and Xylocaine (Exhibit 38, page 1). Upon followup evaluation of February 28, 1977, Dr. DePonte suggested that the claimant be started on Sterazolidin and advised him to obtain physiotherapy. He further concluded tha the claimant should stay out of work for as long as possible, as his car polishing work involving exclusively the left upper etremity seemed to be aggravating his symptoms (Exhibit 38, page 2).

Exhibit 39 is a report of injury form dated February 28, 1977, filled out by the treasurer of the claimant's employer, the Wilson Auto Sales Company. The report stated that the claimant was subject to pain in the left shoulder from polishing cars by hand and that his injury had occurred on February 28, 1977 (Exhibit 39).

On March 16, 1977, Dr. Nathan Levy submitted a report (Exhibit 37, page 1), wherein he indicated that he had seen the claimant on February 9, 1977, after the claimant has apparently injured his right hip, thigh, and ankle while working. Dr. Levy expressed his opinion that the claimant had suffered a sprain of his left lower extremity and that there should be no permanent disability as a result of his injury. On April 14, 1977, Dr. DePonte submitted an additional report (Exhibit 40), noting that the claimant had a lumbar sprain, a bicipital tendinitis of the left shoulder, and a sprain of the left ankle which was improving. The claimant's main complaint was a left shoulder pain which prevented him from performing his car polishing work. This condition was reportedly persisting despite the Steroid injection. Dr. DePonte again recommended physiotherapy.

On April 27, 1977, orthopedist Hubert Bradburn noted that he had seen the claimant for shoulder pain, but that the claimant was obtaining no benefit from treatment. Dr. Bradburn was at a loss to suggest any further treatment.

In a report of June 15, 1977, Dr. Allen Toole expressed his belief that the claimant had bilateral thoracic outlet compression syndrome, as well as cervical ribs. Dr. Toole advised surgery (Exhibit 42, page 1). In a brief report of March 3, 1978 (Exhibit 42, page 2), Dr. Toole reaffirmed his belief that the claimant had thoracic outlet syndrome.

On June 28, 1977, the claimant was seen in orthopedic consultation by Dr. Ned Shutkin, primarily for assessment of left shoulder pain and incidentally for evaluation of his low back (Exhibit 71). X-rays of the left shoulder did not show any severe physical abnormality, and X-rays of the low back did show what was termed profound narrowing of the fourth lumbar intervertebral space. Dr. Shutkin's impression was that the claimant continued to have some tendinitis of the left shoulder which might be improved with appropriate ultrasonic treatments, physical therapy, and anti-inflammatory medication. Surgery was suggested as a possible

alternative. However, Dr. Shutkin noted that the claimant's present shoulder function was not too bad as long as the claimant did not indulge in this particular occupational activity of car washer and polisher. With respect to the claimant's low back problem, Dr. Shutkin concluded that the claimant presented evidence of a mild herniated lumbar disc with right nerve impingement but without neurological deficit. A corset and exercise therapy were recommended, as well as further observation.

Exhibit 86 pertains to Dr. Shutkin's ongoing assessments of the claimant's medical condition. In addition to the previously mentioned evaluation of June 28, 1977, Dr. Shutkin also examined the claimant on January 17, 1978, and July 19, 1978. On January 17, 1978, the claimant told Dr. Shutkin that he still had the same difficulty, referable both to his left shoulder and to his low back. Dr. Shutkin's clinical findings upon examination established considerable improvement in the claimant's condition. With respect to the claimant's shoulder, Dr. Shutkin stated that despite the claimant's expressions of extreme disability, he could find no objective or tenable subjective evidence of any residual effects of trauma or of any other active pathology.

On July 19, 1978, Dr. Shutkin provided a lengthy and detailed report in which he summarized the claimant's medical history as well as his own prior examinations and reports. Dr. Shutkin noted that as of the date of this examination, the claimant's complaints were referable to the left shoulder and to both heels and did not include complaints of low back pain. While the claimant also complained of some hip pain, Dr. Shutkin stressed that this was in no way related to the previously reported sciatica. X-ray studies of the cervical spine were described as negative for evidence of bone or joint pathology, traumatic or otherwise. However, Dr. Shutkin thought it significant that the claimant did have a congenital irregularity of the seventh cervical vertebra which was termed to be a prime factor in a bilateral scalenus anticus syndrome. X-ray of the lumbar spine revealed that the claimant had only four presacral non-rib bearing vertebrae with degenerative changes throughout the lumbar spine and substantial narrowing of the fifth lumbar intervertebral space. At this time, Dr. Shutkin provided a comprehensive diagnostic impression in which he concluded that:

A. The claimant did have some residual disability referable to the left shoulder, with the claim of progressive attrition to the rotator cuff of the shoulder being tenable in terms of the claimant's activity. However, Dr. Shutkin said the surgery was not advisable and would assess only a permanent partial disability of 10 percent on the basis of current findings.

B. With respect to the claimant's thoracic outlet syndrome, also termed scalenous anticus syndrome, it was noted that the claimant did have the congenital element of the bilateral cervical ribs. He further stated that despite the positive test, the claimant did not have any particular symptoms typical of such a thoracic outlet syndrome and that there was no neurological deficit to indicate any disability stemming therefrom. He further stressed that the examination of the cervical spine was completely negative.

C. With respect to the claimant's low back difficulties, Dr. Shutkin concluded that despite the congenital anomalies recounted, the claimant did not present any tenable subjective or objective findings of any active low back pathology.

D. With respect to the claimant's complaints of foot pain, Dr. Shutkin concluded that the claimant did have chronic plantar fascial strain, particularly on the left side, but that this was not occupationally related.

Exhibit 43 pertains to the reports of podiatrist Leonard Schneider covering the period of January 6, 1978, through April 11, 1978. Dr. Schneider treated the claimant for spurs in both heels.

On April 12, 1978, orthopedist David Poverman submitted an evaluation of the claimant's condition (Exhibit 74). He noted that the claimant's primary complaints were of pain in the left shoulder as well as low back pain. X-rays of the left shoulder were negative and X-rays of the cervical spine showed a slight disc space narrowing but no spurring at C3-4 as well as a large cervical rib on the right. X-rays of the lumbar spine showed disc space narrowing at L4-5 and L5-S1. Dr. Poverman provided the following diagnoses: (1) right cervical rib, (2) degenerated disc at L4-5 and L5-S1 to a mild degree, and (3) tendinitis at the long head of the biceps. It was

concluded that the tendinitis was probably attributable to the claimant's repetitive movements at his car washing job. Dr. Poverman stated that without surgery, the claimant would probably have a permanent partial disability of 15% loss of use of the left arm.

On May 1, 1978, claimant was seen in orthopedic consultation by Dr. Allen Goodman whose report is set forth as Exhibit 44. Dr. Goodman noted the claimant's complaints of left shoulder pain as well as the fact that he had been treated by a large number of doctors with medication and injection treatments without success. After examination and review of X-rays obtained from Dr. Poverman, Dr. Goodman concluded that it was possible that the claimant's left shoulder symptoms were secondary to chronic bicipital tenosynovitis. Upon examination, the claimant's lumbrosacral motion was limited and the patient was unable to reverse his lordosis. Nevertheless, his straight leg raising test was termed negative bilaterally. Dr. Goodman termed this paradoxical. The lower extremity examination was totally unremarkable. Dr. Goodman concluded that the claimant's problems with his right shoulder and lumbrosacral spine were insufficient cause to render the claimant disabled and unable to carry out a large number of gainful occupations. Dr. Goodman apparently erroneously referred to the right shoulder instead of the left shoulder.

On May 18, 1978, Dr. Leonor Zito provided a neurological evaluation of the claimant's condition. Dr. Zito noted the claimant's long and complicated medical history as well as the fact that he was still undergoing medical evaluation for his multiple problems. From her neurological perspective, Dr. Zito concluded that the claimant had chronic low back pain which was possibly due to the congenital malformation. She felt that this problem should be ruled out, although there was no clear neurological deficit related to it. The alleged neurological deficit relating to the 1957 car accident, was specifically described as very minimal, manifested by the claimant's difficulty with small, fine, and rapid alternating movements. In an accompanying residual functional capacities evaluation, Dr. Zito concluded that the claimant had the physical strength to perform as much as light work, that he could sit for one to two hours and walk and stand for one to two hours without rest. Restrictions placed on the claimant were described as difficulties in stooping, kneeling, crouching, and crawling, as well as problems of complete use of his

legs due to pain. Again, it was noted that the claimant's complaints of chronic low back pain needed further workup (Exhibit 48).

In a report of June 13, 1978, Dr. Alvin Greenberg evaluated the claimant's complaint of low back injury providing the impression that while the claimant likely had an early disc syndrome, he certainly did not show enough to warrant any more aggressive treatment than back strengthening exercises and lumbar support (Exhibit 53). This consultative report was provided at the request of Dr. DePonte.

On June 27, 1978, the claimant was seen in a hospital emergency room for treatment of pain in his left shoulder, right arm, and behind his neck. The diagnosis was of a probable cervical rib. The claimant was treated with a cervical collar and moist heat, Tylenol with Codeine and released (Exhibit 54).

X-rays of the cervical spine taken on June 27, 1978, indicated the existence of bilaterally prominent transverse processes of the C7 or cervical rib variance (Exhibit 55).

On June 28, 1978, Dr. Alvin Greenberg submitted a statement (Exhibit 76), in which he indicated that the claimant has a permanent partial disability of the back of 5%.

In a report of July 10, 1978 (Exhibit 56), Dr. Ralph DePonte indicated that the claimant had come into the office for evaluation of his arm and back problems. The claimant's diagnoses were listed as cervical ribs, bicipital tendinitis on the left and low back strain. It was noted that the claimant also apparently had a CVA type of injury which left him with a residual right sided weakness. Dr. DePonte's neurologic examination was essentially unchanged from prior examinations. It was his feeling that a resection of the anomalous cervical rib on the right would be reasonable to alleviate the claimant's numbness and tingling in his right upper extremity. Dr. DePonte felt that Dr. Greenberg was in a better position to comment on the claimant's neck and back complaints. Dr. DePonte further indicated that there should be no medical intervention concerning the claimant's chronic left shoulder problems.

On October 3, 1978, the claimant was seen in a hospital emergency room for evaluation and treatment of pain in both heels

which was found to be attributable to small spurs. He was treated with heat and medication and discharged (Exhibit 57).

In a report of examination dated October 16, 1978 (Exhibit 59), Dr. DePonte noted the existence of small spurs of the claimant's heels. Since the claimant's Steroid injections had not satisfactrily relieved his symptoms, it was suggested that he should change the type of shoe he customarily wore. The claimant was described as being able to walk fairly well as of the date of this examination and did not display any appreciable limp (Exhibit 59).

In a report of orthopedic consultation dated October 30, 1978, Dr. Ralph DePonte provided the impression that the claimant had chronic tendinitis of the left shoulder and changes of the acromial-clavicular joint. He was also reported to have a superficial sensory deficit of the left forearm secondary to a traumatic laceration as well as bilateral cervical ribs. It was noted that tests for thoracic outlet syndrome were sometimes positive. The claimant also had chronic fascitis of both feet (Exhibit 33).

In a letter addressed to Dr. DePonte on November 6, 1978, consulting physician Bruce Hask reported that he had done electrodiagnostic studies on Mr. Williams to evaluate possible thoracic outlet syndrome. While Dr. Hask's tests provided no evidence to support the diagnosis of thoracic outlet syndrome, he did note that this did not necessarily mean that the claimant was not subject to this condition (Exhibit 60).

The claimant continued to be treated by Dr. DePonte for complaints of pain in the shoulder, hand, neck, and lower back. He received injections of Steriods and Xylocaine. On January 11, 1979, Dr. DePonte provided his opinion that because of his multiple systems disorders including chronic tendinitis, bilateral cervical ribs, chronic fascitis and thoracic outlet syndrome, the claimant was essentially completely disabled from performing any type of useful occupation requiring use of the upper extremities. In addition, the chronic fascitis was described as making any occupation requiring standing or walking appreciable distances virtually impossible. It was Dr. DePonte's impression that this "disability" had been present in February, 1977, and had continued through January 11, 1979 (Exhibit 61).

Exhibits 24 and 26 establish that the claimant received medical care in 1962 and again in 1965 because of depression and weight loss. In a report of June 4, 1979, Dr. Ralph DePonte noted his ongoing treatment of the claimant for his shoulder, heel and back problems. The claimant had been given a pair of arch supports for his feet and was also given a prescription for Tylenol with Codeine. In a physical capacities evaluation of June 18, 1979, Dr. DePonte reported that the claimant had the strength to perform sedentary work. He specified that the claimant had a health systems disability with respect to his shoulder, back and both heels and that, in addition, he had a minor CVA some years ago (Exhibit 64). However, Dr. DePonte also found at this time that the claimant could only sit, walk, or stand for continuous periods of 1/2 to 1 hour.

Chiropractor William Seery submitted a report on July 10, 1979, in which he indicated that he had seen the claimant on six separate occasions between June 5, 1979, and June 27, 1979, for treatment of severe chronic pain in the lumbar region with radiation into the anterior thigh and groin on the right side. The claimant was described as being unresponsive to manipulative treatments and Dr. Seery recommended neurological consultation.

On June 5, 1980, podiatrist Anthony Nezlo submitted a report wherein he indicated that he had treated the claimant on December 5, 1978, and expressed his agreement with Dr. DePonte that any work requiring any standing or walking would be extremely difficult for the claimant (Exhibit 67.)

On June 18, 1980, Dr. DePonte provided a report to Attorney Robert M. Casale, the claimant's representative in the instant proceeding (Exhibit 66). Dr. DePonte reviewed the claimant's past medical history, treatment and diagnoses. He summarized by describing the claimant as an individual who had restricted use of his upper extremities because of a congenital cervical problem, difficulty in sitting for any length of time because of a chronic problem in his low back, an inability to stand and walk for long periods of time because of his chronic fascitis. Dr. DePonte concluded that "it would seem an almost impossible task to write a job description which would allow this individual to work at any gainful employment."

In a subsequent report to claimant's counsel dated September 29, 1980 (Exhibit 70), Dr. DePonte made specific reference to the claimant's restriction and range of motion of both shoulders. Dr. DePonte concluded there was a 19% impairment on the right shoulder on the basis of restricted motion and a 27% impairment of the left shoulder, again on the basis of restricted motion.

On November 18, 1980, consulting orthopedist David Poverman provided an evaluation of the claimant's condition (Exhibit 87). At this time the claimant was complaining of severe pain, primarily under his heels, in his lower back, and in his left shoulder. Dr. Poverman's examination disclosed a full range of motion at the hips, knees, and cervical spine. The claimant reportedly considered his left arm his good arm as he reportedly had residual weakness in his right arm, hand, and leg stemming from his 1957 automobile accident. X-rays of the lumbar spine showed minimal spurring and disc space narrowing with slight posterial spurring at L4-L5. (Note: The minimal spurring was at the anterosuperior border of the bodies of L3-L2.) Dr. Poverman provided the diagnoses of degenerated disc at L4-5, mild tendinitis of the left shoulder, bilateral metalapolgia and plantar fascitis. He concluded that the claimant was able to do at least sedentary or light work. In his accompanying physical capacities evaluation, Dr. Poverman specified that the claimant could lift and carry as much as 20 pounds on occasion, and that he could sit, stand and walk for two hour intervals and for as much as three hours during an eight hour day. He further reported that the claimant was able to use his hands for repetitive action and that there were no restrictions on the claimant's ability to use his feet for repetitive movements. The claimant was further described as being occasionally restricted with respect to his abilities to bend, squat, and reach.

SUMMARY OF TESTIMONY

The claimant testified that he was 44 years old at the time of the hearing and that he is a high school graduate. He stated that in the past he had performed mechanical, cleaning, and janitorial work, but that for some 17 years prior to the time he last worked on February 28, 1977, he was employed as a car washer and polisher by the Wilson Auto Company.

The claimant testified that he had for many years suffered from severe and widespread pain. According to the claimant, the pain was primarily located in both feet and both legs. In the right leg, the pain reportedly extended down below the knee. In the left leg, the pain reportedly extended down below the knee. In the left leg, it was present from the area of the groin to the knee. At no time had he undergone back surgery. The claimant also emphasized that he had for many years suffered from severe pain in the left shoulder. The claimant, who is right handed, stated that since a 1957 automobile accident, which had reportedly resulted in paralysis of his right side, he had used his left hand as his dominant hand. The claimant stated that medications he had taken in 1977 did not help his condition.

The claimant stated, in effect, that his motion was so restricted and his pain so severe that he was unable to bend to put on his shoes and socks and that his wife had done this for him for the past five years. The claimant acknowledged that he was presently taking some medication for his pain, but was unable to identify the particular type. He also stated that he had in the past worn a belt support with metal stays which had been prescribed by Dr. DePonte in 1977, but that he had not worn this for the past month.

The claimant further reported that he is presently treated by Dr. DePonte whom he had last seen a few weeks ago and who prescribed him medication. At the prior administrative hearing of May, 1979, the claimant testified that he had not seen Dr. DePonte since December, 1978, and that he did not take medication on a daily basis. (Exhibit 78, pages 62, 63, & 64)

With respect to his present physical functional capacity, the claimant maintained that he is able to sit comfortably for only 10 to 15 minutes but that further sitting would result in pain in the right leg and both feet and that sometimes his feet would go to sleep on him. He stated that he used a cane at home, but did not bring it to the hearing. His ability to stand comfortably was similarly restricted to a period of about ten minutes and further standing would be accompanied by pain on the bottom of both feet. The claimant further stated that he had minimal problems with walking for distances of up to 50 feet, but that further walking would be accompanied with pain extending from his left groin to left knee. Testimony concerning his capacity to lift was somewhat vague and not responsive. On the one hand, he stated that he would have to get

down on his knees to pick up an object off the floor and that he could lift ten pounds if somebody handed a ten-pound object to him. On the other hand, in response to a direct question as to whether he felt he could lift more than five pounds, the claimant answered "I haven't tried."

The claimant lives in his own home with his wife and daughter. He does little if anything in the way of household maintenance and is essentially dependent upon his wife and daughter to do the chores. He reportedly goes out very infrequently, but stated he was able to drive a car on very short trips to a local store. However, this driving activity was limited to two to three miles per week. The claimant stated that most of his time at home was spent lying on the couch in an attempt to be comfortable, that he watched a lot of TV, but did no reading and had no hobbies. In response to questioning by his attorney, the claimant stated that he had suffered from severe pain essentially on a daily basis from February, 1977. The primary locations of the pain were again described as being the legs and feet.

The hearing commenced at 11:10 a.m. and the claimant asked to be excused at approximately 1:05 p.m. During the one hour and 55 minutes in which he was in attendance, the claimant stood up for brief periods two or three times appearing to be in some discomfort. He grimaced frequently during the course of the hearing and appeared at times to be somewhat annoyed or upset because of questioning by the Administration Law Judge. It was felt by the undersigned that this display was occasioned more by general frustration or impatience with the proceedings than by actual physical pain or discomfort. The claimant wore loafers to the hearing. He had a somewhat heavy set, muscular physical appearance with a ruddy complexion and gave the appearance of being in a state of good health.

The claimant's wife, Lynn Williams, stated that she had been married to and living with the claimant since August, 1962. She stated that during this period, the claimant's only job had been as a carwasher and polisher and that he had no other special training education or experience. She stated that the claimant had stopped working on February 28, 1977, upon the recommendation of Dr. DePonte and that the claimant was suffering from severe left shoulder pain at this time. She performed essentially all the household chores and the claimant did not assist with even simple

tasks such as vacuuming or dusting. According to Mrs. Williams' testimony, the claimant's condition had changed little since February, 1977. His primary activity, reportedly, was lying down on the couch watching the television. The claimant is able to dress himself but "not too often". Mrs. Williams stated that the claimant required her assistance in putting on his shoes and socks. Mrs. Williams further stated that the claimant presently had a poor mental attitude and that he did not think life was worth living. She was able to provide some more specific information concerning the claimant's medications, stating that he presently takes Tylenol with Codeine and that in December, 1980, he had taken Nemex with Nalfon, that in September, 1980, he had taken Robaxin, and that in October, 1980, he took Motrin. It appeared from her testimony that the claimant has had a somewhat sporadic course of medications and that he does not feel he has had a positive response to any of the prescribed medications. In fact, Mrs. Williams indicated that at times during the past three years and for a seven or eight month period during 1979, the claimant had tried not to take any medications.

Dr. James K Phillips, a licensed psychologist, testified at the hearing as a vocational expert. He described the claimant's work history as involving unskilled entry level positions. The Administrative Law Judge posed a hypothetical question to the vocational expert wherein it was assumed that an individual of the claimant's age, education, and work background suffered from the following impairments and limitations: back ailment, pain in both feet, left shoulder pain. The individual was assumed to have gross manipulative ability. The individual was assumed to be right handed but had more strength in the left hand and favored the right hand. It was further assumed that such an individual could sit, stand, and walk two hours during the day. These periods were considered to be not necessarily continuous but it was assumed that the claimant could alternate these positions during the regular work day, if necessary. The back ailment was assumed to require medication at times, but despite this impairment, the individual was assumed to be able to lift up to ten pounds. The individual was further assumed to suffer from chronic foot pain which still permitted him to walk for two hours during the day, as well as shoulder pain, which sometimes needed medication. The vocational expert concluded that such individual would not be capable of performing the work formerly

performed by the claimant as he would lack sufficient strength. In response to the question as to what alternative jobs might be within the capacity of such an individual, the vocational expert testified such an individual could perform some limited entry level type jobs such as information guard, watchman guard, light packager, stamper and marker. In response to a hypothetical question posed by claimant's counsel, the vocational expert testified that if an individual of the claimant's age, education, and work experience, with his physical impairments, was unable to either stand, sit or walk for periods of more than 1-1/2 hours at a time, that such an individual would be incapable of performing any kind of substantial gainful work which exists in the national economy. The vocational expert also testified that if such an individual suffered from brain damage which significantly limited his ability to remember, and if he suffered from a chronic irritability, these additional factors would further limit the types of occupations which might be available to him. Throughout his testimony and his responses to all of the hypothetical questions posed him, the vocational expert emphasized that a critical factor in determining the residual functional capacity and employability of the claimant was the degree of pain which he suffered.

DISPOSITION OF PROCEDURAL MATTERS

The claimant was represented by his attorney during all of the proceedings which took place before this Administrative Law Judge in the resolution of the primary issue of disability and entitlement to disability benefits and a period of disability based upon his application for such benefits filed on July 28, 1977. The great mass of documents potentially includable in the record was reduced to a workable size by agreement with the claimant's attorney. It is the considered opinion of the undersigned that the record as established in the instant proceeding is a complete record of all relevant material evidence needed to fully present the meritorious issues involved in the claimant's request for a hearing and decision by an Administrative Law Judge as mandated by the remand order of the Appeals Council acting upon the order of the United States District Court.

Several requests were made by the claimant's spouse to act as his representative in a "co-representative" capacity with counsel. Such requests have not been allowed and are expressly rejected by the undersigned. The claimant has been and continues to be ably represented by an attorney. To the extent that the attorney did not join in the authoring of the tremendous flow of documents submitted by the claimant's spouse in the claimant's name, the same have not been made a part of this record and are contained in one folder marked Appendix if needed for reference on appeal.

A request for disqualification of the undersigned to act as the adjudicator in this entire proceeding was withdrawn by the attorney at the commencement of the hearing without amplification.

A request for subpoenas made by the attorney was resolved by the submission of interrogatories to two physicians who responded thereto as indicated in the record.

Counsel objected to the reports of Dr. Ned M. Shutkin and Dr. David Poverman, especially the latter, on the grounds that they were not unbiased or neutral consultative physicians having been retained to examine the claimant on behalf of the employer and/or insurer for workmen's compensation benefits which were disputed. Upon reviewing all the reports of those physicians, I find no evidence in the record demonstrating bias or prejudice of the respective examining physicians. The record discloses no fact which prevents the undersigned from accepting the reports of these two physicians as an expression of their own observations of the claimant, his description of his symptoms, findings upon examination and medical conclusions reached after completion of such examination. I find that these physicians have prepared their reports in accordance with the standards expected of an examining physician and that the challenge to their credibility is without merit. I find no evidence indicating that the physicians under discussion have been or are committed to a finding or conclusion adverse to the claimant's pursuit of entitlement to benefits under the Social Security Act.

In view of the multiple medical reports and evidence contained in the record, I have decided that requesting further examination of the claimant by yet another physician is not warranted.

At the hearing, the undersigned made it clearly known to the claimant, his spouse and his attorney that only the one counsel was recognized by this adjudicator as the representative acting on the claimant's behalf in these entire proceedings. Subsequent to the hearing, numerous documents continued to reach this office expressing the efforts of the spouse, with the claimant's approval, to raise additional issues and add further argument in support of the claim for benefits. This activity included expressing challenges to the propriety of the proceedings by the undersigned with submission of such challenges to persons and officials outside of this forum. The record is to show that in preparing and issuing this recommended decision, the undersigned was not influenced by any person or official outside of this forum, nor was my decision influenced by the unusual procedures and challenges made known to me which were adopted by the claimant and his spouse in pursuing their objective.

EVIDENCE CONSIDERED

The undersigned has carefully considered all the testimony given at the hearing, the arguments made, and the documents described in the List of Exhibits attached to this decision. The documentary record consists of Exhibits marked 1 through 102.

EVALUATION OF THE EVIDENCE

To be entitled to disability insurance benefits, the claimant must establish that his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work, but cannot considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.

As stressed by the United States District Court in its Remand Order, a crucial determination to be made by the undersigned concerns the credibility of the claimant's subjective complaints of pain and functional limitations. If the claimant's testimony with respect to his pervasive severe pain and his inability to sit, stand, walk, bend and move were accepted as totally credible, it would indeed, in the words of his treating physician, "seem an almost impossible task to write a job description which would allow this individual to work at any gainful employment".

The undersigned recognized the generally accepted principle that subjective complaints of pain may, if credible, form the basis of a disability determination even if they are unaccompanied by specific clinical findings or objective medical evidence. While such complaints cannot be dismissed or discounted because they may be largely inconsistent with or unsupported by the record medical evidence, the extent of such inconsistency or unsupportability is one of the factors to be considered by the undersigned in making a credibility determination. Therefore, it is significant to the undersigned that in the instant case, the claimant's subjective complaints of total disability due to pain, loss of mobility, and loss of function are glaringly inconsistent with the substantial weight of the medical evidence. It is noted that the medical record as a whole could be interpreted to support the claimant's allegations of left shoulder pain and foot pain. But aside from statements of treating Dr. DePonte, the voluminous medical record does not contain any medical opinion expressing a conclusion that the claimant's pain is so severe or his loss of function so great as to prohibit him from performing any substantial gainful activity, or that his purportedly disabling impairment was of continuing severity for any 12-month period. There is, in fact, substantial medical evidence expressive of a contrary conclusion, indicative of medical opinion that the claimant's complaints have been exaggerated.
For example:

> On June 28, 1977, examining physician Shutkin concluded with respect to the claimant's alleged lower back impairment that he presented evidence of a mild herniated lumbar disc, but recommended only a corset, exercise therapy, and further observation.
>
> On January 17, 1978, Dr. Shutkin indicated that examination of the claimant's low back presented a completely normal lumbar lordosis without any muscle spasm. The leg tests of low back derangement were negative and no neurological deficit was noted. Dr. Shutkin also concluded at this time with respect to the claimant's shoulder complaint that "despite the claimant's evincing extreme disability, I can find no objective or tenable subjective evidence of any residual effects of trauma or any other active pathology".
>
> In his summary of July 19, 1978, Dr. Shutkin concluded that while the claimant had a 10% disability of the left shoulder, he

still did not present any tenable subjective or objective findings of any active low back pathology and that he did not have any particular symptoms typical of a thoracic outlet syndrome and that there was no neurological deficit indicative of a disability stemming therefrom.

On April 12, 1978, Dr. Poverman concluded that the claimant suffered from a degenerated disc at L4-5 and L5-S1, but only to a mild degree.

On May 1, 1978, Dr. Goodman termed the claimant's negative straight leg raising test "paradoxical" given the claimant's self-demonstrated limitation of motion. He concluded that the claimant's problems with his shoulder and spine were "insufficient cause to render the claimant disabled and unable to carry out a large number of gainful occupations".

In her report of May 18, 1978, neurologist Leonor Zito concluded that there was no clear neurological deficit stemming from the claimant's congenital malformation deficit and described as very minimal the alleged neurological deficit relating to the claimant's 1957 car accident.

On June 13, 1978, Dr. Alvin Greenberg stated that while the claimant likely had an early disc syndrome, he certainly did not show enough to warrant any more aggressive treatment than back strengthening exercises and a lumbar support.

It is significant to the undersigned that the claimant's assertions regarding his strength to the contrary, the medical evaluations have uniformly indicated that the claimant has the *strength* to perform at least sedentary work (Exhibits 86, 44, 48, 64, and 87). This specific opinion has been shared even by treating physician DePonte. With respect to the reports of Dr. DePonte, it is further noted that although he had treated the claimant from February, 1977, onward, it was not until January 11, 1979, that Dr. DePonte made any kind of conclusion concerning the claimant's "disability" and that even this conclusion failed to set forth any specific findings concerning the claimant's inability to perform sedentary work. While the claimant maintained at the hearing that he had ceased working

upon the advice of Dr. DePonte, it is clear from Dr. DePonte's 1977 reports that the claimant was seen at this time primarily for treatment of his shoulder injury rendering return to car polishing work inadvisable, but not necessarily leading to the conclusion that the claimant was thereby rendered incapable of performing alternative employment. Furthermore, the evidentiary weight to be afforded Dr. DePonte's letters of January 11, 1979, and June 19, 1980, must be considered in light of all of the medical evidence including his own prior reports as well as the fact the latter report was specifically offered to claimant's counsel in preparation for the instant hearing.

After painstaking review of the medical evidence the undersigned has outlined, *supra*, the reasons why such documentary evidence is inconsistent with and not supportive of the claimant's testimony. Attention is now focused on other factors pertinent to a credibility determination:

(1) The claimant discontinued work in apparent response to a flareup of shoulder pain, yet as indicated by both his testimony and documentary evidence, his other impairments substantially predated the alleged onset of disability. As evidenced by the claimant's Social Security earnings record, the claimant engaged in regular work activity throughout 1975 and 1976 earning in excess of $11,000 from car polishing work in each of these years. It is significant to a consideration of the potentially disabling effect of the claimant's non-shoulder impairments that (a) at the hearing of May, 1979, the claimant testified that "my feet were bothering me for years before I left Wilson's", (b) the claimant's cervical rib condition has been described as congenital and like his thoracic outlet syndrome, did not prevent him from working unsuccessfully for many years, (c) similarly, despite the auto accident of 1957, and the minor CVA and residual right-sided weakness, the claimant worked successfully for many years, and (d) the claimant complained of and was treated for back problems as early as May, 1976, but again worked successfully until February, 1977. The medical evidence shows that the frequency of treatment for back problems has in fact diminished in recent years. In sum, it is significant to the undersigned that despite the existence of numerous long-standing afflictions and

complaints the claimant worked regularly until February, 1977, at a job, which in addition to repeated arm and shoulder movements involved almost constant standing, walking, and bending. This fact casts doubt upon the extent to which the claimant's non-shoulder impairments contribute to his alleged disability.

(2) Since the alleged onset of his disability, the claimant has not required inpatient hospitalization. He has never undergone back surgery or a myelogram although some surgical procedures have been recommended to him as a means of alleviating his pain.

(3) In the past three years, the claimant has been treated only by Dr. DePonte and on a relatively infrequent basis.

(4) While over the years the claimant has been prescibed various medications by different doctors, neither testimony nor the testimony of his wife indicated that during the past few years, he has regularly taken major pain medication.

(5) While the claimant and his wife generally asserted that he does little except lie on the couch, he is capable of driving a car albeit on limited occasions and for very short distances. He is generally mobile and considering his wife's work activity and daughter's school attendance, has evidently been capable of taking independent care of his personal needs during the day.

(6) At the hearing of January, 1981, the claimant did not emphasize the existence of back pain, but did stress experiencing shoulder and leg pain. Some of the claimant's testimony concerning his pain is puzzling. For example, he testified that he can only sit for 10 to 15 minutes but then would feel pain in his left leg and both feet. While it is indicated by the medical evidence that the claimant's foot problem is incidental to the chromic plantar fascitis which is aggravated by walking and standing, it would seem that this pain would be alleviated by sitting. As noted, in response to the undersigned's inquiry as to his ability to lift 5 pounds, the claimant stated "I haven't tried." The latter statement

is not credible in view of the abundant medical evidence regarding the claimant's functional capacity.

(7) The claimant's appearance and demeanor at the hearing were suggestive of chronic irritability and frustration with the proceedings, but were not suggestive of a manifestation of severe disabling pain.

For all of the reasons outlined *supra*, the undersigned concludes that the claimant's subjective complaints of disabling pain, loss of strength, and loss of function are not credible. While it is acknowledged that these symptoms exists to a certain degree, the claimant's assertions concerning their purported disabling severity are rejected.

Attention is now focused on the extent to which the claimant's impairments and symptoms restrict the type of jobs which he is capable of performing. In the judgment of the undersigned, the claimant retains the strength to perform sedentary work, an assessment which is uniformly held by medical opinion throughout the record.

Given the claimant's age, education, and work experience, and considering the vocational testimony as well as the medical-vocational guidelines contained in Appendix 2 to Subpart P of Social Security Regulations No. 4, it is apparent that, if in fact the claimant retained the residual functional capacity to perform a full range of sedentary work, he would be found to be not disabled. However, the claimant asserts that additional restrictions placed upon his abilities to sit and stand comfortably as well as ostensibly an impairment of his mental capacity, render him incapable of performing even sedentary work on a regular and sustained basis.

Vocational expert Phillips testified that the ability to perform sedentary work presupposed an ability to sit comfortably for a continuous period of between 1-1/2 to 2 hours. Social Security Regulation 404.1567 states that although a sedentary job is defined as one which involves sitting, a certain amount of walking, and standing is also necessary in the carrying out of such job duties. The regulation further specifies that jobs are sedentary if walking or

standing are required occasionally and other sedentary critieria are met. In the instant case, the claimant's combination of impairments result in strength limitations as well as non-exertional limitations, the non-exertional limitations being postural limitations and some manipulative limitations. Given the residual effects of his minor stroke, the claimant apparently lacks the ability to perform fine hand and finger manipulative limitations. Given the residual effects of his minor stroke, the claimant apparently lacks the ability to perform fine hand and finger manipulation. However, his gross manipulation is unimpaired. Since there are some non-exertional limitations, the medical-vocational guidelines contained in Appendix 2, to Subpart P cannot be used to direct a finding in this case, although, as noted, the undersigned concludes from the record evidence that the claimant retains the strength to perform at least sedentary work. The rules contained in the appendix do, however, provide a framework for consideration of how much the claimant's work capability is further diminished in terms of any types of jobs that would be contraindicated by the non-exertional limitations. The undersigned is satisfied that the claimant does not suffer from any mental impairment which would significantly affect his residual functional capacity to perform sedentary work. The claimant has received no psychiatric or psychological treatment or consultation. There is no convincing documentary or testimonial evidence provided that the claimant's thought processes or intellectual capacity are at all diminshed. As noted, while the claimant did manifest a somewhat irritable demeanor, he was able to understand the questions of the Administrative Law Judge which he answered as he saw fit and displayed full command of his faculties and mental resources. Nor is there any probative evidence that the claimant's irritability is of such severity that it could be expected to affect significantly his relationship with supervisors or coworkers.

To undersigned, the most prominent factor is determining the claimant's residual functional capacity to perform alternative work is his alleged back pain. Consideration of the claimant's back pain aside, the undersigned is satisfied that the claimant's other impairments notwithstanding, he is capable of performing many sedentary jobs. It is the further judgment of the undersigned that if the claimant's residual functional capacity is not or was not additionally

constricted by severe low back pain specifically affecting his ability to sit, considering said residual functional capacity within the framework of the medical-vocational guidelines as well as the vocational testimony, the claimant would retain the ability to perform a significant range of sedentary occupations as specified by the vocational expert. The crucial but difficult determination to be made concerns the extent to which the claimant's work-related functions were or are complicated by back pain.

The claimant has, in the past, received sporadic evaluation and treatment for his complaints of low back pain which had been generally felt to be attributable to recurrent lumbar strains as well as what has been described as a mild herniated lumbar disc with slight nerve impingement (Exhibits 71 and 35). The claimant was treated with exercises and a lumbar support (Exhibit 53), received repeated chiropractic treatments, and was treated by Dr. DePonte by medications and injections. However, as stressed at length *supra*, the consensus medical opinion has been that this has not been a serious impairment. The claimant has not required surgery or other major medical intervention because of his back problem. Despite the specific statement of Dr. DePonte, the substantial weight of the medical, testimonial, and circumstantial evidence supports the conclusion herein made that despite his slight back impairment, the claimant has at all times retained the ability to sit down for continuous two-hour periods during a normal work day. It is also noted that the claimant is able to walk an appreciable distance as evidenced by his own statement that he had "no problems" with walking as much as 50', that he is able to stand for short periods, and that, as indicated by his behavior at the hearing, he prefers to change position from time to time. It is specifically concluded that the claimant's ability to sit has not been severely restricted by back pain, and that he has been able to sit for sufficient periods to perform sedentary work.

Reference is made to the vocational expert's testimony concerning the circumstances under which an individual of the claimant's age, education, and work experience could perform some limited work such as information guard, watchman guard, packager, marker or stamper of finished products. It is concluded that the substantial

weight of the testimonial and medical evidence, as well as the claimant's appearance and demeanor at the hearing, the absence of inpatient hospitalization and regular pain medication, as well as his work activity despite many impairments up until his alleged onset date established that the claimant has at all times retained the residual functional capacity to perform the alternative jobs suggested by the vocational expert.

Reference is also made to the medical-vocational guidelines contained in Appendix 2 to Subpart P of Social Security Regulations No. 4. As noted, these rules cannot be used to direct a factual finding of disabled or not disabled as in the instant case the claimant is suffering from a combination of impairments causing both exertional and non-exertional limitations. However, it is concluded that neither the claimant's back pain nor the impairment of his manipulative abilities would significantly affect his residual functional capacity for sedentary work. Therefore, the claimant's residual functional capacity is to be considered within the framework of the above-cited regulations.

Given the claimant's age of 45, his high school education, his unskilled work experience, and his residual functional capacity for many types of sedentary work, his medical-vocational profile closely corresponds with Rule 201.18. Considering the claimant's residual functional capacity along with his age, education and work experience within the framework of said rule 201.18, and taking cognizance of the vocational testimony, it is concluded that the claimant retains the residual functional capacity to perform certain unskilled sedentary jobs such as light packager, watchman guard, information guard, marker, and stamper. As evidenced by the vocational testimony, these jobs can be performed with a 10-pound strength capacity. Given the claimant's strength capacity for work, the postural and manipulative limitations placed upon him would not contraindicate performance of a sufficient number of the otherwise suitable sedentary occupations so as to warrant a conclusion that the claimant is unable to engage in any substantial gainful activity.

In making this determination, the Administrative Law Judge acknowledges that in light of the voluminous and complex medical

record developed over the course of 24 years as well as the diversity of the claimant's allegations, there exist certain ambiguities and conflicts which are incapable of precise reconciliation.

It is not necessary for the undersigned to reconcile every conflicting shred of medical evidence but it suffices that the undersigned carefully consider all the exhibits presented in the evidence as a decision is reached.

The undersigned is satisfied that the claimant has had a full, fair, and impartial hearing and that the substantial weight of the medical, testimonial, and other documentary evidence suggests the decision herein recommended. It is found that at no time through the date of this recommended decision has the claimant been disabled within the meaning of the Social Security Act.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the special earnings requirements of the Act on February 28, 1977, the date that the claimant stated he became unable to work, and continues to meet them through at least September 30, 1981.

2. The claimant has the following impairments: chronic tendinitis of the left shoulder, chronic plantar fascitis, mild degenerated disc at L4-5, episodic muscle spasms of the lower back, bilateral cervical ribs, probable thoracic outlet syndrome, residual right-sided weakness from possible minor CVA sustained in 1957.

3. The claimant's subjective complaints of totally disabling pain, loss of function, and loss of strength are not credible. The claimant does not suffer from any mental impairment which significantly limits his ability to perform basic work-related functions.

4. The claimant has the residual functional capacity to perform

work-related functions except for work involving more than sedentary exertion, fine dexterity or fine manipulative abilities, or sustained sitting, walking, or standing for more than two-hour continuous periods.

5. The claimant is unable to perform his past relevant work as a car washer and polisher.

6. Considering the exertional limitations only, the claimant has the residual functional capacity for at least sedentary work as defined in Regulation 404.1567.

7. The level of work the claimant can do in light of the exertional limitations is not affected by the non-exertional limitations to an extent which would preclude the performance of substantial sedentary work.

8. The claimant is 45 years old, and is a younger individual as defined in the Social Security Regulations.

9. The claimant has a high school education.

10. In view of the claimant's age and residual functional capacity, the issue of transferability of work skills is not material.

11. Based on the claimant's exertional limitations only, Regulation 404.1569 and Rule 201.18 of Appendix 2, Subpart P, Regulations No. 4, would direct a conclusion that the claimant, considering his residual functional capacity, age, education, and work experience, is not disabled.

12. The claimant's non-exertional limitations do not totally restrict his residual functional capacity for sedentary work. Therefore considering that capacity within the framework of the above rule, the claimant is not disabled.

13. Considering his age, education, work experience, and residual functional capacity, the claimant retains the ability to perform some selected sedentary jobs such as light packager, information guard, watchman guard, marker, and stamper. These jobs exist

in significant numbers in the geographical area of the claimant's residence.

14. Because he retains the ability to perform substantial alternative work, the claimant was not under a "disability", as defined in the Social Security Act, at any time through the date of this decision.

RECOMMENDED DECISION

In view of the foregoing, it is the recommended decision of the Administrative Law Judge that the claimant, based on his application filed on July 28, 1977, is not entitled to a period of disability or to disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act, as amended. However, this decision is a recommendation only and the Appeals Council will issue a final decision allowing or denying the claim.

Pursuant to the order of the Appeals Council, the claimant may file, within twenty days from the date of notice of the recommended decision, briefs, or other written statements of exceptions and comments as to applicable facts and law. After the twenty-day period has expired, the Appeals Council will review the record and issues its decision.

CLEMENT J. KICHUK
Administrative Law Judge

DATE: July 24, 1981

APPENDIX N

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION OF APPEALS COUNCIL

In the case of
Richard E. Williams

Claim for
Period of Disability and Disability Insurance Benefits

Social Security Number
047-28-0012

The United States District Court for the District of Connecticut remanded this case (Civil Action Number N-79-338) to the Secretary of Health and Human Services for further administrative action. Thereafter, the Appeals Council remanded the case to an administrative law judge.

On July 24, 1981, a recommended decision was issued to which exceptions have been received.

On August 11, 1981, the claimant submitted a voluminous brief and during the following two weeks, several addenda were made. He argued that he had sustained the burden of proof by showing that he was unable to return to his former work but that the Secretary had not shown through substantial evidence that there is other work which he could do. The claimant also made numerous objections to alleged procedural deficiencies by the administrative law judge including: (1) his failure to disqualify himself from the

proceedings, (2) his disqualification of the claimant's wife as co-counsel, (3) his failure to subpoena medical witnesses to testify at the hearing, (4) his failure to admit documentary evidence into the record and, (5) his admission of other evidence into the record which the claimant found prejudicial.

The Appeals Council believes that the administrative law judge's recommended decision *does* meet the Secretary's burden of proof in establishing that the claimant can perform substantial gainful activity. The decision not only clearly and accurately summarizes and evaluates the medical record, but also attempts to answer the claimant's objections and is totally in keeping with the terms of the United States District Court's ruling and the United States Magistrate's judgment.

The District Cout instructed the administrative law judge to carefully evaluate the claimant's subjective complaints of pain and obtain additional medical reports from treating sources to clarify and focus medical opinion. This he has done. The Court also noted that "... it is not surprising that the evidence lacks cogent focus when it is considered that the couple lacked an attorney's guidance in presenting testimony and eliciting pertinent opinion in persuasive context." Therefore, it is not surprising that the administrative law judge should disqualify the claimant's wife as co-counsel, (she, of course, was allowed to testify), or seek to focus the attention on the specific issues. In fact, a pre-hearing conference was held in order to clarify the issues, identify the need for any additional medical evidence, eliminate duplicate or procedural documents from the record and set forth ground rules for the formal hearing. The Council, therefore, believes that the claimant's objections are substantially lacking in merit, are not persuasive in showing that he has been denied due process and do not warrant any modification of the administrative law judge's recommended decision.

The Appeals Council adopts the findings and conclusions in the recommended decision. It is the decision of the Appeals Council that, based on the application filed on July 28, 1977, the claimant is

not entitled to a period of disability or to disability insurance benefits under the Social Security Act, as amended.

APPEALS COUNCIL

Marshall C. Gardner, Member

Roland L. Vaughan, Jr., Member

DATE: October 13, 1981

APPENDIX O

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT
CIVIL NO. N-79-338

RICHARD E. WILLIAMS, ... **Plaintiff**

VS.

PATRICIA R. HARRIS,
Secretary of Health, Education and Welfare, ... **Defendant**

RULING ON PENDING MOTIONS

In these limited judicial review proceedings, cf. 42 U.S.C. § 405(g), plaintiff challenges administrative denial of his benefits claim under the Social Security Act for asserted "disability", i.e., "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment", 42 U.S.C. §

423(d)(1)(A). This Court has no power to retry the merits of such a claim *de novo*, see, e.g., *Bastien v. Califano*, 572 F.2d 908, 912 (2 Cir. 1978). When the defendant Secretary has applied correct legal standards in reaching decision, see, e.g., *Marcus v. Califano*, 615 F.2d 23 (2 Cir. 1979), the administrative findings of fact must be treated as conclusive if supported by "substantial evidence", § 405(g) — "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion", *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). In testing the administratively developed record to determine whether such "substantial evidence" exists, the Court is of course "performing an appellate function", *Zambrana v. Califano*, 651 F.2d 842, 844 (2 Cir. 1981). As this Court earlier observed in remanding the instant claim for administrative rehearing opportunity to clarify the record after plaintiff had secured counsel, see, e.g., *Hankerson v. Harris*, 636 F.2d 893, 897 (2 Cir. 1980), "the Secretary is the trier of fact" and "must accordingly exercise the trier's necessary authority in resolving uncertainties or conflicts and in assessing persuasive weight of proofs; this Court is not free simply to substitute its judgment for . . . [the Secretary's] in such matters", *Williams v. Harris*, Civil No. N-79-338, slip op. at 2 (D. Conn. 1980). Studied in that light, the extensive record now before the Court does seem to yield adequate support for the Secretary's adverse ruling, despite plaintiff's forceful arguments to the contrary.

Plaintiff is a middle-aged man, a high school graduate who had long been employed in an unskilled, physically demanding job washing and polishing cars; he claims to have been unable to continue or to do any other useful work from 1977 on due to numerous professed ailments and associated pain. The Secretary had found that plaintiff does suffer to some degree from the following conditions: "chronic tendinitis of the left shoulder, chronic plantar fascitis, mild degenerated disc at L4-5, episodic muscle spasms of the lower back, bilateral cervical ribs, probable thoracic outlet syndrome, residual right-sided weakness from possible minor CVA sustained in 1957". The Secretary has also found, however, that plaintiff's "subjective complaints of totally disabling pain, loss of function, and loss of strength are not credible", and that he "does

not suffer from any mental impairment which significantly limits his ability to perform basic work-related functions".

Disability for the purpose of the statutory benefits sought would exist if the demonstrated "impairments are of such severity" that plaintiff "is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy", 42 U.S.C. § 423(d) (2) (A). Although concluding that plaintiff no longer could "perform his past relevant work as a car washer and polisher", the Secretary has also determined that plaintiff does retain "that ability to perform some selected sedentary jobs such as light packager, information guard, watchman guard, marker, and stamper", and is therefore not disabled within the strict meaning of the Social Security Act.

The threshold issue is whether the decision rests on the application of proper legal principles, and there appears no ultimate failure here to recognize controlling legal standards. After lengthy rehearing on remand, an administrative law judge denied plaintiff's disability claim by written opinion thoroughly detailing his assessment of the voluminous evidentiary record, and that ruling was approved by the appeals council. As is well settled, a benefits claimant has the burden of proving disability, but once he shows "that his impairment prevents his return to his prior employment, the burden shifts to the Secretary, who must produce evidence to show the existence of alternative substantial gainful work" which the claimant could still do, *Parker v. Harris*, 626 F.2d 225, 231 (2 Cir. 1980). At one point in his opinion, the administrative law judge did indicate rather broadly that "the claimant must establish that his . . . impairments are of such severity that he is not only unable to do his previous work, but cannot . . . engage in any other kind of substantial gainful work", paraphrasing the statutory "disability" language set forth above, cf. 42 U.S.C. § 423(d) (2) (A). In approving that administrative trier's recommended decision, however, the appeals council expressly took into account "the Secretary's burden of proof in establishing that the claimant can perform substantial gainful activity". The administrative law judge's development of the hearing record and his weighing of

evidence, moreover, make it clear enough that the burden shift was actually understood and addressed by him at the hearing stage. Indeed, the administrative law judge patently followed no mere "failure of proof" analysis, but acted affirmatively to produce and evaluate evidence. For example, instead of simply pointing to the Secretary's "medical-vocational" guidelines, cf. *Parker v. Harris, supra* at 234, and attempting to take administrative notice of undemanding jobs which plaintiff could do with the personal limitations credited from medical evidence and lay testimony, the administrative law judge called a vocational expert witness who testified at some length when posed varying hypotheticals by the hearing judge and plaintiff's counsel, discussing as well the relative significance of factors mentioned and the corresponding demands of a number of specific, unskilled jobs of a "sedentary" nature. Cf. *Campbell v. Secretary of Health and Human Services*, 665 F.2d 48, 53-54 (2 Cir. 1981), *cert. granted*, 50 U.S.L.W. 3998.01 (1982).

In response to certain states of health hypothesized by the administrative law judge, that expert witness considered that plaintiff could perform such limited jobs as that of an "information guard where he can sit or stand at will and walk around an area in which he's located". In response to other hypothetical inquiries by plaintiff's counsel, the witness considered that plaintiff could perform such limited jobs as that of an "information guard where he can sit or stand at will and walk around an area in which he's located". In response to other hypothetical inquiries by plaintiff's counsel, the witness agreed that plaintiff would be "unemployable" if "the ingredient of pain" were credited, and concurred in counsel's description "that the most critical factor . . . as to any of the hypotheticals posed would be the degree of pain that the man suffers". In that regard, the administrative law judge clearly understood that "subjective" pain complaints *can* be sufficient basis for disability, the question being one of credibility, see, e.g., *Marcus v. Califano, supra* at 27, and that the central problem in this instance would be to gauge that true extent of pain experienced. As noted at the outset, no wholly disabling degree of pain was eventually credited. The question in these limited review proceedings is again simply whether that assessment by the administrative trier is permissible on the evidence presented.

Whatever this Court's view of the evidence's persuasive weight might have been, there does seem at least "such relevant evidence as a reasonable mind might accept as adequate", *Richardson v. Perales, supra* at 401, to support the Secretary's conclusions, as indicated in the administrative law judge's careful and detailed written evaluation of medical evidence and other indicia of credibility. He was surely aware in that connection that the "expert opinion of a claimant's treating physician is entitled to particular weight", *Parker v. Harris, supra* at 231, indeed generally said to be "binding on the factfinder unless contradicted by substantial evidence to the contrary", *id.* at 232, quoting *Bastien v. Califano, supra* at 912. The real question again is just how the reliable state of the evidence might reasonably appear to the trier; again, however this Court might have ruled as a trier, there was "more than a mere scintilla", *Perales, supra* at 401, of evidence to raise doubts for the administrative factfinder.

For example, although plaintiff's treating physician, Dr. DePonte, did finally label him disabled, the observations of other examining orthopedic surgeons could have fairly indicated substantial reason to the Secretary to adopt a different view. Limits of plaintiff's functioning, in his ability to sit or stand for certain periods, or to move about, are naturally linked to the degree of pain credited, and there are a number of potentially telling reports of medical examination. On one occasion, Dr. Poverman noted full motion of plaintiff's cervical spine without tenderness, and further reported a negative straight leg raising test with little back tenderness and no spasm, concluding that plaintiff should be "able to do at least sendentary light work". On another, Dr. Goodman remarked that his negative straight leg raising test result was "paradoxical", and commented that while plaintiff "arose with an expression of discomfort", he "moved about quite freely when he disrobed"; Dr. Goodman found no "sufficient cause to make this patient disabled and unable to carry out a large number of gainful occupations". In the course of one of his examinations, Dr. Shutkin found that although plaintiff was "evincing extreme disability" of shoulder, there appeared "no objective or tenable subjective evidence of any residual effects of trauma or of any other active pathology". On a

subsequent examination, Dr. Shutkin reported further that plaintiff "does not present any tenable subjective or objective findings of any active low back pathology". Such indications as these logically have bearing on a trier's assessment of both the overall state of the medical evidence and the credit to be given lay testimony more generally.

In these and other pertinent respects discussed at length in the administrative law judge's opinion, the Secretary as factfinder could have reached varying evaluations of plaintiff's state, including the evaluation indicated by hearing colloquy with the vocational expert witness. Since that assessment appears permissible, not lacking a "substantial evidence" foundation when the factfinder's appropriate role in drawing inferences and resolving ambiguities is borne in mind, this court has no authority in these limited review proceedings to disturb the Secretary's final decision.

Subject now to prior and *de novo* review by the trial judge of the instant ruling on any timely objection, cf. 28 U.S.C. § 636(b), Rule 2, D. Conn. Rules for U.S. Magistrates (as amended, October 1, 1981), plaintiff's motion for summary judgment herein is accordingly denied, and the defendant Secretary's motion for affirmance is correspondingly granted.

Dated at New Haven, Connecticut, this 15th day of April 1983.

ARTHUR H. LATIMER
UNITED STATES MAGISTRATE

APPENDIX P

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT
CIVIL NO. N-79-338

RICHARD E. WILLIAMS, ... **Plaintiff**

VS.

PATRICIA R. HARRIS,
Secretary of Health, Education and Welfare, ... **Defendant**

JUDGEMENT

This cause came on for consideration on plaintiff's motion for summary judgment and defendant Secretary's motion for affirmance before the Honorable Arthur H. Latimer, United States Magistrate, and a Ruling on Pending Motions having been filed on April 15, 1983, denying plaintiff's motion and granting the defendant Secretary's motion for affirmance, and, after review of the Magistrate's ruling, the plaintiff's objections thereto, and the relevant portions of the file, the Honorable T.F. Gilroy Daly, Chief Judge, United States District Court, having adopted, approved and ratified said ruling.

It is ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendant and the Secretary's decision is affirmed.

Dated at New Haven, Connecticut on the 6th day of May 1983.

SYLVESTER A. MARKOWSKI
CLERK, UNITED STATES
DISTRICT COURT

BY _____
DEPUTY IN CHARGE

APPENDIX Q

May 19, 1983. After reviewing plaintiff's motion for reconsideration, renewed review of the Magistrate's ruling, and the file in this case, the Court adheres to its initial ruling, affirming the Magistrate, and the motion for reconsideration is, accordingly, denied.

T.F. GILROY DALY,
Ch. U.S.D.J.

APPENDIX R

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

APPOINTMENT OF REPRESENTATIVE

I appoint Lynn Williams to act as my representative in connection with my claim under Titles II, XVI, or XVIII of the Social Security Act based on the social security record of
Richard E. Williams
Social Security Number 047-28-0012

I authorize her to make or give any request or notice; present or elicit evidence; obtain information; and receive any notice in connection with my claim wholly in my stead.

225 Stony Creek Road,
Branford, CT.

DATE: October 20, 1978

ACCEPTANCE OF APPOINTMENT

I, Lynn Williams, hereby accept the above appointment. I certify that I have not been suspended or prohibited from practice before the Social Security Administration; that I am not, as an officer or employee of the United States, disqualified from acting as the claimant's representative; and that I will not charge or receive a fee for the representation unless it has been authorized in accordance with the laws and regulations referred to on the reverse side hereof.

I am the wife of Richard E. Williams

_____

25 Stony Creek Road
Branford, Connecticut

DATE: October 20, 1978

APPENDIX S

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

APPOINTMENT OF REPRESENTATIVE

I appoint Robert M. Casale to act as my representative in connection with my claim under Titles II, XVI, XVIII of the Social Security Act and/or Title IV of the Federal Coal Mine Health and Safety Act based on the social security record of
Richard E. Williams
Social Security Number 047-28-0012

I authorize my representative to make or give any request or notice; present or elicit evidence; obtain information; and receive any notice in connection with my claim wholly in my stead.

225 Stony Creek Road
Branford, CT 06405

DATE: September 11, 1980

ACCEPTANCE OF APPOINTMENT

I Robert M. Casale, hereby accept the above appointment. I certify that I have not been suspended or prohibited from practice before the Social Security Administration; that I am not, as an officer or employee of the United States, disqualified from acting as the claimant's representative; and that I will not charge or receive a fee for the representation unless it has been authorized in accordance with the laws and regulations referred to on the reverse side hereof. In the event that I decide not to charge or collect a fee for the representation I will notify the Social Security Administration.

I am attorney for Richard E. Williams

250 West Main Street
Branford, CT 06405

DATE: September 11, 1980

APPENDIX T

225 Stony Creek Road
Branford, CT 06405
June 8, 1983

U.S. Court of Appeals
U.S. Courthouse
Foley Square
New York, N.Y. 10007

Att: Ms. Valentine
Pro Se Law Clerk's Office

Certified Mail - PO3 3110313
Returned Receipt Requested

Dear Ms. Valentine:

Re: Docket Number - N-79-338
Richard E. Williams
Vs.
Secretary of Health & Human Services
District - Connecticut
Judge - Honorable T.F. Gilroy Daly
Date Filed In District Court - September 24, 1979
Date Notice Of Appeal Filed - May 27, 1983

The undersigned hereby requests this honorable Court to construe this letter as a motion for permission to allow counsel of record, Robert M. Casale, to withdraw from this appeal, as counsel of record, for the following reasons:

1. This appeal arises from an October 19, 1981 motion by the undersigned to restore his case to the active docket, through his lay representative, Lynn C. Williams, who is also wife of the undersigned.

2. Pursuant to the May 31, 1983 Civil Appeal Pre-Argument Statement wherein it was represented to this Court that the undersigned would seek an affidavit from his counsel of record -the undersigned, through his lay representative, did obtain such affidavit by Attorney Casale dated June 6, 1983.

3. All actions from the date of October 19, 1981 to the date of May 31, 1983 were not Attorney Casale's except for a Supplemental Memorandum In Support Of Plaintiff's Motion for Summary Judgment filed through Attorney Casale's associate on November 12, 1982.

4. By the time the undersigned received the magistrate's (Latimer, M.) ruling dated April 15, 1983, Attorney Casale was engaged in a criminal trial at the Superior Court in Milford, Connecticut unitl June 3, 1983.

5. Since the undersigned intends to submit Attorney Casale's June 6, 1983 affidavit, Attorney Casale should be allowed to withdraw as the undersigned's counsel of record in this judicial proceeding.

6. The undersigned's appeal would be prejudiced if Attorney Casale is not allowed to withdraw in this judicial proceeding -since his affidavit and/or testimony are critical to the issues of denial of minimum procedural due process hearing requirement rights and deprivation of the undersigned's constitutional rights - which issues are intended to be raised on appeal.

June 8, 1983
U.S. Court of Appeals
U.S. Courthouse
Foley Square
New York, N.Y. 10007
Att: Ms. Valentine
Att: Pro Se Law Clerk's Office - 2 -

Docket Number - N-79-338
Ricahrd E. Williams
Vs.
Secretary of Health & Human Services
District - Connecticut
Judge - Honorable T.F. Gilroy Daly
Date Filed In District Court - 9/24/79
Date Notice Of Appeal Filed - 5/27/83

The undersigned intends to submit a brief, supporting affidavit of his lay representative, his own affidavit and Attorney Casale's June 6, 1983 affidavit in due course.

Very truly yours,

RICHARD E. WILLIAMS,
Appellant
Pro Se

Certified Mail - PO3 3110313- RRR

CC: Linda K. Lager
Assistant United States Attorney
P.O. Box 1824
New Haven, Connecticut 06508-1824

CC: Robert M. Casale
Attorney at Law
250 West Main Street
Suite 16
Branford, Connecticut 06405

APPENDIX U

LAW OFFICES
CASALE & GONZALEZ
250 WEST MAIN STREET SUITE 16
BRANFORD, CONNECTICUT 06405

June 23, 1983

United States Court of Appeals
U.S. Courthouse
Foley Square
New York, New York 10007

RE: Richard Williams V. HEW

Dear Ms. Valentine:

Please be advised that I no longer represent Richard Williams.

It is my understanding that Mr. Williams intends to proceed on appeal *pro se*. This letter is written at the request of Richard and Lynn Williams.

Sincerely

Robert M. Casale

APPENDIX V

CONSTITUTIONAL PROVISIONS PERTINENT TO THE CASE

United States Constitution, Amendment V:

> Nor shall any person . . . be deprived of life, liberty, or property without due process of law. . .

United States Constitution, Amendment IX:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

APPENDIX W

STATUTES/CODE OF FEDERAL REGULATIONS PERTINENT TO CASE

Code of Federal Regulations

> 20 CFR §404.1546
>
> explains a State agency staff physician must assess residual functional capacity where it is required. This assessment is based on *all* of the evidence provided by treating or examining physicians, consultative physicians, or any other physicians designated by the Secretary
>
> 20 CFR §416.918
>
> explains that the Social Security Administration will consider bias, prejudice partiality or lack of objectivity when a claimant's consultative examining physician represented an interest adverse to a claimant - such as representing the claimant's employer in a worker's compensation case as was the situation with crucial examining Dr. Poverman whom petitioner's, then, counsel strenuously objected to

Statutes, Title 5, U.S.C.A.

> §554(d) (1) and §554(d) (2)
>
> . . . Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, *unless* on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency

§557(d) (1) (C) (i), (ii) and (iii)

(d) (1) (C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowlingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph.

Title 42 U.S.C. 405(g)

[t]he court shall have power to enter, upon the pleadings and transcript of the record a judgment with or without remanding the cause for a rehearing.

APPENDIX X

REGULATORY PROVISIONS PERTINENT TO THE CASE

Social Security Regulations

§404.922 (disqualification of presiding officer)

No presiding officer shall conduct a hearing in a case in which he is prejudiced or partial with respect to any party or where he has any interest in the matter pending for decision before him.

§404.922a (pre-hearing conferences)

A record shall be made of all agreements and actions resulting from any such conference and the presiding officer shall issue an order setting forth all such agreements and actions.

§404.926 (subpoenas)

When reasonably necessary for the full presentation of a case; a presiding officer or member of Appeals Council, may, either upon his own motion or upon the request of a party, issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers,or other documents which are relevant and material to any matter in issue at the hearing.

§404.927 (conduct of hearing)

. . .The order to which evidence and allegations shall be presented and the procedure at the hearing, generally, except as these regulations otherwise expressly provide, shall be in the discretion of the presiding officer and of such nature as to afford the parties a reasonable opportunity for a fair hearing.

§404.980 (notice of charges in connection with disqualification or suspension of an individual from acting as a representative)

The Deputy Commissioner, or the Director (or Deputy Director) of the Bureau of Retirement and Survivors Insurance will prepare a notice containing a statement of charges that constitutes the basis for the proceeding against the individual. This notice will be delivered to the individual charged, either by certified or registered mail to [her] last known address or by personal delivery, and will advise the individual charged to file an answer, within 30 days from the date the notice was mailed, or was delivered to [her] personally, indicating why [s]he should be suspended or disqualified from acting as a representative before the Social Security Administration.

§404.983 (hearing on charges)

(a) Hearing officer. Upon receipt of the notice of charges, the record and the request for hearing (See §404.982), the Director, Bureau of Hearings and Appeals, or his delegate shall designate an Administrative Law Judge to act as a hearing officer to hold a hearing on the charges.

APPENDIX Y(1)

AFFIDAVIT OF LYNN C. WILLIAMS

I, Lynn C. Williams, being duly sworn depose and say as follows:

1. On October 20, 1978, Richard E. Williams appointed me to be his lay representative to represent him and I accepted such appointment in connection with his social security disability claim filed on July 28, 1977 alleging an onset date of disability on February 28, 1977.

2. At no time prior to or at the January 15, 1981 hearing did Judge Kichuk or his hearing assistant, Mary Meoli, disclose that they or either of them caused a written communication and certain medical exhibits to be transmitted to the State Agency adjudicator, Raymond Cestar for transmittal to Dr. Poverman.

3. Although I discovered, in December, 1981, a form letter of request entitled Request For DDS Assistance In Obtaining Consultative Examination(s) dated October 17, 1980 indicating a medical exhibits folder had been transmitted to the State Agency when I examined the case files of Richard E. Williams, I was unable to determine from Staff Attorney Richard White the specific medical exhibits which had been transmitted from the Bureau Office in New Haven to the State Agency in Hartford for transmittal to Dr. Poverman in New Haven at said time.

4. At no time prior to or at the January 15, 1981 hearing did Judge Kichuk or his staff attorney disclose that they or either of them caused written and telephonic communications to be transmitted to both Drs. Goodman's and Shutkin's offices.

5. At no time at the hearing did Judge Kichuk or his staff attorney orally state that they or either of them had caused a telephonic communication to be made to the office of Dr. Poverman.

6. On January 15, 1981, the date of the hearing, only the evidentiary record was offered for inspection prior to Richard E. Williams' impending hearing - his files were not offered at said time.

7. There were ninety-one exhibits to view; I was caught "off-guard" and taken completely by surprise at the January 15, 1981 hearing when I discovered only minutes before the hearing Exhibits 82, 84, 85 and 86.

8. In April of 1981, after I telephoned and wrote Chief Administrative Law Judge Philip T. Brown, I was allowed to return to the New Haven Bureau Office to inspect the Bureau files which were not offered for inspection on the date of the hearing, January 15, 1981, and discovered two letters dated January 7, 1981 sent by Staff Attorney White to one Mrs. Giannotti of Dr. Goodman's office and one Mrs. Patricia Johnson of Dr. Shutkin's office -eight days before the scheduled January 15, 1981 hearing date.

9. Judge Kichuk stated in his July 24, 1981 decision on page 21 (transcript of administrative proceedings page 983) that Richard E. Williams "In the past three years . . . has been treated only by [orthopedist] Dr. DePonte" which statement is erroneous and inaccurate in that Richard E. Williams had not been discharged from the care of other physicians including chiropractor Dr. Seery, podiatrist Dr. Nezlo and thoracic surgeon Dr. Toole and had been actively treating with Drs. Seery and Nezlo.

10. Judge Kichuk stated in his July 24, 1981 decision on page 23 (transcript of administrative proceedings page 985) that Dr. DePonte was Richard E. Williams' treating physician for his back problem which statement is erroneous and inaccurate in that Dr. DePonte, according to Dr. DePonte's reports in the evidentiary record, merely evaluated his back condition, prescribed exercises and referred him for consultative examination. Moreover, Dr. Seery had actually rendered repeated chiropractic treatment to Richard E. Williams for his lumbar malady not Dr. DePonte which was erroneously and inaccurately reported by Judge Kichuk on page 23 (transcript of administrative proceedings page 985) in his July 24, 1981 decision.

11. On March 26, 1982, I attended a status conference; present were Attorney Lager, Judge Daly's assistant and Judge Daly. Attorney Lager and I reported no further papers would be filed in the, then, pending judicial proceeding in the District Court; additionally I reported a memorandum had been filed in opposition to the motion for affirmance.

12. On January 21, 1983, I arrived at Judge Daly's office for the purpose of attending a second scheduled status conference, in behalf of Richard E. Williams, but was informed by Judge Daly's assistant that the conference had been cancelled. I, thereafter, inquired of Judge Daly's assistant - the identity of counsel the Court recognized to be responsible to the Court in the case of Richard E. Williams v. the Secretary and why no counsel, in behalf of the Secretary, had ever filed an appearance with the Court - as of said date. Judge Daly's assistant informed

me that, since I had made the inquiry, the Court would require Attorney Lager to file her appearance.

13. By the time the Magistrate's proposed ruling dated April 15, 1983 was received by Richard E. Williams and the undersigned, his counsel of record, Robert M. Casale, was engaged in defending another client in a criminal jury trial, who had exposure to possibly receiving the death penalty; Attorney Casale remained so on trial until June 3, 1983 when the jury returned a verdict.

_____

Lynn C. Williams, Affiant

Subscribed and sworn to before me this 5th day of July, 1983.

My Commission Expires
On April 1, 1986

_____

August V. DeGenaro, Notary Public

APPENDIX Y(2)

AFFIDAVIT OF ROBERT M. CASALE

I, Robert M. Casale, being duly sworn, depose and say as follows:

1. On February 11, 1980, I entered my appearance as counsel for Richard E. Williams, in addition to the pro se appearance of Richard E. Williams at the United States District Court for the District of Connecticut at New Haven, docket number N-79-338.

2. On September 11, 1980, Richard E. Williams appoi. d me to represent him and I accepted such appointment in connection

with his social security disability claim filed on July 28, 1977 alleging an onset date of disability on February 28, 1977.

3. On September 11, 1980, a pre-hearing conference was held before Staff Attorney Richard F. White for Administrative Law Judge Clement J. Kichuk, at the Bureau of Hearings & Appeals Office, 234 Church Street, New Haven, Connecticut. Attorney White indicated Administrative Law Judge Kichuk suggested that I prepare a letter regarding my stand on the issue of subpoenas and that Judge Kichuk would rule possibly, before the hearing - but in no event later than on the hearing date before the conclusion of the hearing on Mr. Williams' claim regarding my stand regarding subpoena requests. Moreover, Attorney White further indicated that Judge Kichuk required Richard E. Williams to undergo another physical examination by a State Agency medical consultant who turned out to be Dr. David Poverman.

4. On October 14, 1980, I had requested, in writing, the issuance of subpoenas for the appearance and testimony of various physicians including orthopedic Drs. David Poverman, who was also an adversary medical consultant retained by Mr. Williams' employer's workers compensation insurer to represent the insurer's interest in disputed compensation claims, Alan Goodman, who was also a medical consultant retained by the Secretary (of Health, Education & Welfare now known as the Secretary of Health & Human Services) and Ned M. Shutkin, who was another adversary medical consultant retained by Mr. Williams' employer's workers compensation insurer to represent the insurer's interest in disputed compensation claims.

5. On January 15, 1981 the hearing of Richard E. Williams took place at the aforestated Bureau office whereat Judge Kichuk suggested that I could possibly send written interrogatories to the physicians I wanted subpoenaed rather than him issuing subpoenas; I was not to write such physicians directly though I was to submit such interrogatories through him and he would correspond with such physicians.

6. At no time prior to or during the hearing did Judge Kichuk or his hearing assistant, Mary Meoli, disclose in any manner whatsoever, that they or either of them, had caused the issuance of a form letter of request entitled Request For DDS Assistance In Obtaining Consultative Examination(s) with an attached Medical Exhibits Folder with unspecified medical exhibits contained therein. A copy of the said form letter of request is located on page 857 of the transcript of administrative proceedings and is dated October 17, 1980. Said form letter of request with attached Medical Exhibits Folder contained certain medical exhibits that were transmitted to the State Agency for transmittal to Dr. David Poverman in conjunction with the consultative physical examination that was to be performed by him on November 14, 1980 requested by Administrative Law Judge Clement J. Kichuk.

7. At no time prior to or during the hearing did Judge Kichuk or his Staff Attorney, Richard F. White, disclose that they or either of them had caused to be issued a letter to Dr. Alan Goodman's office personnel, one Mrs. Giannotti, on January 7, 1981 - eight days before the scheduled hearing. A copy of the said letter to the office of Dr. Goodman is located on page 863 of the transcript of administrative proceedings.

8. At no time prior to or during the hearing did Judge Kichuk or his Staff Attorney, Richard F. White, disclose that they or either of them had caused to be issued a letter to Dr. Ned M. Shutkin's office personnel, one Mrs. Patricia Johnson, on January 7, 1981 - eight days before the scheduled hearing. A copy of the said letter to the office of Dr. Shutkin is located on page 862 of the transcript of administrative proceedings.

9. On January 15, 1981, the date of the hearing only the evidentiary record was offered for inspection prior to Richard E. Williams' impending hearing - Mr. Williams' files were not offered at said time which contained the October 17, 1980 transmittal to Dr. Poverman through the State Agency as described in paragraph 6 above, the January 7, 1981 letter to Dr. Goodman as

described in paragraph 7 above and the January 7, 1981 letter to Dr Shutkin as described in paragraph 8 above.

10. Just prior to the impending hearing, Lynn C. Williams, wife of Richard E. Williams and I discovered amongst other things: (1) a memo dated January 5, 1981 regarding the aforestated September 11, 1980 pre-hearing conference prepared by Staff Attorney Richard F. White, which is Exhibit 82 on transcript page 1591, (2) a Report of Contact dated January 5, 1981 disclosing a telephonic communication initiated by Attorney White to the office of Dr. Poverman regarding Dr. Poverman's true identity, which is Exhibit 84 on transcript page 1593, (3) a letter dated January 9, 1981 addressed to Attorney White from Dr. Goodman with his rubber-stamped signature and his (Dr. Goodman's) signature affixed to his medical report dated May 1, 1978, which is Exhibit 85 on transcript pages 1594 through 1596 and (4) a letter dated January 9, 1981 addressed to Attorney White from Dr. Ned M. Shutkin with his signature affixed to each of ten pages of medical reports all dated January 9, 1981 in connection with three medical reports of his dated July 19, 1978, June 28, 1977 and January 17, 1978, which is Exhibit 86 on transcript pages 1597 through 1607.

11. Although I was counsel and representative for Richard E. Williams, I was never furnished with copies of the foregoing transmittals ie. the October 17, 1980 form letter with attached medical exhibits folder containing a medical exhibits folder with unspecified exhibits by Judge Kichuk's hearing assistant to the State Agency for transmittal to Dr. Poverman, the January 7, 1981 letter by Judge Kichuk's Staff Attorney to Mrs. Giannotti, of Dr. Goodman's office nor the January 7, 1981 letter by Judge Kichuk's Staff Attorney to Mrs. Patricia Johnson of Dr. Shutkin's office.

12. I did not see copies of the foregoing transmittals described in paragraph 11 above until Lynn C. Williams showed them to me in April of 1981 which was long after Mr. Williams' hearing in January of 1981.

13. I had no reason to believe Dr. Poverman was furnished with selective reports through the State Agency through Judge Kichuk's hearing assistant because Judge Kichuk denied such accusation by Mrs. Lynn C. Williams and Richard E. Williams made prior to Mr. Williams' hearing on December 12, 1980 which is on transcript pages 1102 through 1105. Because of his denial, which is on transcript pages 1167-1168 I did not have any reason to believe the accusations made by the Williams' - until I read Dr. Poverman's interrogatory response to interrogatory 6, which is on transcript pages 1666 and 1667 dated April 3, 1981 which was long after the January, 1981 hearing on Mr. Williams' disability claim.

14. Moreover, I was not furnished with a copy of the May 15, 1981 letter of the Acting Regional Chief Administrative Law Judge John B. Murray Jr. addressed to Mr. and Mrs. Richard E. Williams from either Judge Murray or Judge Kichuk whose name was noted on same.

15. I had no knowledge of the aforestated May 15, 1981 letter that was sent to the Williams' as described in paragraph 14 above, which was transmitted while Mr. Williams' claim was under consideration by Judge Kichuk until sometime after when Mrs. Lynn C. Williams showed me same. Said letter appears as Exhibits 8 and 9 attached to the Memorandum In Support of Plaintiff's Motion To Reconsider, Re-Open And Set Aside Judgement dated May 16, 1983 filed with the Unites States District Court for the District of Connecticut at New Haven on May 16, 1983.

16. I was caught "off-guard" at the January 15, 1981 hearing. There were ninety-one exhibits to view; I was taken completely by surprise upon discovery only minutes before the hearing Exhibits 82, 84, 85 and 86 described in paragraph 10 above.

17. Although I had an appearance, in addition to the pro se appearance of Richard E. Williams in the District Court described in paragraph 1 above, I did not receive a copy of the transcript of the administrative proceedings from any counsel in

behalf of the Secretary of Health & Human Services formerly know as the Secretary of Health, Education & Welfare.

18. The copy of the transcript of the administrative proceedings supplementally certified on October 10, 1981 was delivered in hand to my associate, Attorney M. Yvonne Gonzalez by Mrs. Lynn C. Williams and was not received by us for several months after November 12, 1981 - the date when it was noticed filed with the United States District Court for the District of Connecticut at New Haven.

_____

Robert M. Casale
Affiant

Subscribed and sworn to before me this 6th day of June, 1983.

_____

Frank A Carrano
Commissioner of the Superior Court

County of New Haven
State of Connecticut

My Commission Expires on

_____

APPENDIX Z

25 Stony Creek Road
Branford, CT 06405
March 16, 1984

Kurt F. Zimmermann, Esquire
United States Attorney
P.O. Box 1824
New Haven, CT 06508

Re: Richard E. Williams
Vs.
Secretary of Health, Education
& Welfare

Sir:

Pursuant to our recent conversations I enclose herewith a copy of the ruling in connection with the Wayne Holland V. Patricia Roberts Harris case - civil docket number H-79-635 and respectfully direct your attention to footnote 54. Please be reminded I feel very strongly that you should consider scrutinizing the record in this case - especially the three affidavits appended to the appellant's brief, the crucial physician's (Dr. Poverman's) interrogatory response in the evidentiary record to interrogatory 6 along with the appellant's brief, reply brief and petition for rehearing, with suggestion of en banc rehearing. I feel very strongly that simply because the Second Circuit has been upheld along the way that that is no justification for you to feel obligated to defend this matter without so scrutinizing the record.

Please be further reminded my affidavit (paragraphs 9 and 10) identified the factual inaccuracies/ errors contained within the administrative law judge's decision.

Incidentally, I am further taking the liberty of enclosing the appellant's medical record from Yale-New Haven Hospital from December of 1983 as same relates to paragraph 9 of my aforesaid affidavit and the appellant's continuing relationship with Dr. Allan Toole which could not be presented to the Second Circuit Court of

Appeals timely because such evidence was not available when the appellant's brief was filed in July of 1983.

Kindly reconsider your position and let me know your pleasure so that I might proceed, in behalf of the appellant, accordingly.

Very truly yours,

LYNN C. WILLIAMS